

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Brian C. Green

Court of Appeals No. WD-09-041

Appellant

Trial Court No. 2007-CV-0484

v.

Ed Foos, et al.

DECISION AND JUDGMENT

Appellees

Decided: January 15, 2010

* * * * *

James A. Hammer, for appellant.

Paul A. Dobson, Wood County Prosecuting Attorney, and Mary
Loeffler Mack, Assistant Prosecuting Attorney, for appellees.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas which granted summary judgment in favor of appellees and denied summary judgment to appellant. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, Brian C. Green, sets forth the following two assignments of error:

{¶ 3} "THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT.

{¶ 4} "THE TRIAL COURT ERRED IN GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT."

{¶ 5} The following undisputed facts are relevant to the issues raised on appeal. Appellant owns an 80-acre parcel in Portage Township, Ohio. The land is a family farm and is zoned agricultural. Appellant operates a boat repair business entitled "Green's Marine Repair" from this agricultural parcel. Appellant publicly advertises his commercial boat repair business in the local Yellow Pages.

{¶ 6} In the course of operating this business, appellant utilizes an array of equipment including a boat mover, boat stands, generator, loader tractor, diesel compressor, bulldozer, trailer, and a backhoe. It is appellant's business practice to depreciate these commercial assets/equipment in his annual tax returns. The revenue stream in appellant's business is generated by charging his clients for the requisite parts and labor in repairing their boat engines, transmissions, and drives at his agricultural property.

{¶ 7} On March 22, 2005, the Portage Township Zoning Inspector notified appellant via written correspondence questioning the commercial activity in connection with his boat business occurring at his agricultural property. The matter remained

unresolved for several years. Ultimately, on March 4, 2006, appellant submitted an application for a zoning permit to the township zoning inspector. On the same day as submission, the application was approved and appellant was issued a permit.

{¶ 8} Upon learning that a permit had been issued to appellant, the township trustees instructed the zoning inspector to notify appellant that the permit was revoked as the requested commercial property use did not comply with the zoning resolution given the parcel's agricultural zoning. Concurrent with notification of the permit revocation, appellant was advised of his right to appeal this decision to the township Board of Zoning Appeals ("BZA"). Appellant did not file a BZA appeal.

{¶ 9} On August 10, 2006, appellant received correspondence from the Wood County prosecutor's office instructing him to cease his boat repair commercial business on his agricultural property within 30 days. On June 25, 2007, appellant filed a complaint for injunctive relief and a declaratory judgment against a multitude of defendants including the township trustees, township zoning commission members, and township BZA members. On August 8, 2007, appellees filed an answer and counterclaim. On March 5, 2009, appellant filed for summary judgment. On March 5, 2009, appellees likewise filed for summary judgment. On April 14, 2009, the trial court issued summary judgment in favor of appellees and against appellant. Timely notice of appeal was filed.

{¶ 10} On appeal, appellant asserts that the trial court erred in granting summary judgment to appellees and in denying summary judgment to appellant. In support,

appellant emphasizes past statements of the trustees that they did not intend to shut his business down, an eight-year period of time in which he conducted his business without interference from the township, and of greater relevance, appellant disputes the trial court's determination that his business does not fall within the home business exception of the township zoning resolution.

{¶ 11} Appellate court review of a trial court's summary judgment determination is conducted on a de novo basis, applying the same standard as that utilized by the trial court. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129; *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Summary judgment will be granted when there remains no genuine issue of material fact and, when considering the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 12} The determinative crux of this case entails an application of the summary judgment legal standard to the specific definition of a permissible home business set forth in the zoning resolution to determine whether reasonable minds could only conclude that appellant's boat repair and storage business does not fall within the parameters of a permissible "Business, In The Home," as set forth in the township zoning resolution.

{¶ 13} The township zoning resolution specifically defines a permissible home business as, "any occupation or activity carried on by a member of the immediate family, residing on the premises; provided there is no commodity sold upon the premises; and not more than one person is employed other than members of the immediate family residing

on the premises; and no mechanical equipment is used except of a type that is similar in character to that normally used for purely domestic or household purposes." The provision goes on to delineate specific categories of businesses that are deemed per se permissible home businesses. Those businesses not falling into one of these per se permitted categories, such as appellant's business, must therefore be determined on a case-by-case basis.

{¶ 14} In granting summary judgment to appellees and against appellant, the trial court emphasized in support of its judgment that appellant's boat business did not meet the definition of a permissible home business for two primary reasons. First, the court noted that the undisputed evidence that appellant's business consists of charging customers a monetary amount comprised of labor and materials for boat repair and/or storage constitutes a prohibited "sale of commodities on the premises." In conjunction with this prohibited activity, the court noted the undisputed evidence that appellant's use of equipment such as boat movers, boat stands, welders, loaders, trailers, diesel compressors, and shrink wrapping equipment constitutes mechanical equipment that is not normally used for purely domestic or household purposes. Thus, the court found that appellant's business was in breach of two facets of the requirements in the zoning resolution for a permissible home business. As such, the trial court held that reasonable minds could only conclude that appellant's boat storage and repair business does not fall within the category of a permissible "In The Home Business" so as to warrant granting appellant's application for a zoning permit.

{¶ 15} Examination of a comparative case furnishes additional guidance in assessing the propriety of the summary judgment determination. In *Jeffrey Mann Fine Jewelers v. Sylvania Twp. Bd. of Zoning Appeals*, 6th Dist. No. L-08-1013, 2008-Ohio-3503, the case analogously entailed the propriety of a violative permit being first issued, then later revoked. In affirming the legitimacy of revoking a permit issued in violation of zoning resolution, the court opined in relevant part, "Here, the Sylvania Township zoning manager was prohibited under the express terms of R.C. 519.17 from issuing a zoning permit to Fleisher unless the proposed design fully complied with the Sylvania Township zoning resolution. Under the undisputed facts, the proposed sign did not comply with the zoning resolution. Issuance of the permit, therefore, violated R.C. 519.17. Once Jeffrey Mann objected to the sign, the zoning manager determined the permit had been issued in error and violated the township zoning resolution. In our view, under such circumstances, R.C. 519.17 imposed a statutory duty on the zoning manager to revoke the permit. This is due to the prohibition under R.C. 519.17 against township zoning inspectors issuing zoning permits that do not fully comply with the township zoning resolution." Similarly, in the instant case, Portage Township properly exercised its statutory duty to revoke a permit issued to appellant in error.

{¶ 16} We have carefully examined the record of evidence, in conjunction with the relevant zoning provisions and case law, to determine whether reasonable minds could only conclude that appellant's boat storage and repair business does not qualify as a permissible home business given the property's agricultural zoning. Based upon the

indisputable sale of a business commodity and the indisputable usage of specialized mechanical equipment not of a character normally used for domestic or household purposes in the course of the sale of that commodity, reasonable minds can only conclude that "Green's Marine Repair" does not fall within the parameters of a permissible home business under the zoning resolution. As such, the permit was issued in error. This triggered a statutory duty upon the township to revoke a permit issued contrary to law. Wherefore, based upon the foregoing, we find appellant's two assignments of error not well-taken.

{¶ 17} On consideration whereof, the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the cost of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.

CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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