COURT OF APPEALS
DECISION
DATED AND FILED

May 13, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2033 **Cir. Ct. No. 2013CV355**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

JOHN L. LERCH,

PETITIONER-APPELLANT,

V.

CITY OF GREEN BAY,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Reversed and cause remanded for further proceedings.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. John Lerch, pro se, appeals an order that dissolved a restraining order prohibiting the City of Green Bay from razing his property. Lerch claims the circuit court erred in multiple respects. We reject Lerch's

arguments, with one exception. We conclude the circuit court violated Lerch's right to due process when it dissolved the restraining order, based on representations in a letter received from the City, without giving Lerch an opportunity to respond to those assertions. We therefore reverse the order dissolving the restraining order and remand this matter for a hearing to determine whether the restraining order should be dissolved.

BACKGROUND

¶2 Lerch owns a building located at 1250 Main Street in Green Bay. On January 24, 2013, the City issued an order for Lerch to raze or repair the building, pursuant to WIS. STAT. § 66.0413(1)(b)1.[1] Section 66.0413(1)(b)1. provides that, "[i]f a building is old, dilapidated or out of repair and consequently dangerous, unsafe, unsanitary or otherwise unfit for human habitation and unreasonable to repair," a municipality may order the property owner to raze the building. Alternatively, "if the building can be made safe by reasonable repairs, [the municipality may] order the owner to either make the building safe and sanitary or to raze the building, at the owner's option." ***Id.***

¶3 An order issued under WIS. STAT. § 66.0413(1)(b) must specify the required repairs, if any, and the time within which the building owner is required to complete them. WIS. STAT. § 66.0413(1)(f). "If the owner fails or refuses to comply within the time prescribed, the building inspector or other designated officer may proceed to raze the building[.]" ***Id.*** The City's January 24, 2013

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

order listed nineteen items Lerch needed to repair to avoid having his building razed. The order required Lerch to complete these repairs within thirty days.

¶4 Lerch filed the instant lawsuit on February 28, 2013, seeking an order restraining the City from razing his building. Under WIS. STAT. § 66.0413(1)(h), a person affected by an order to raze or repair a building may "apply to the circuit court for an order restraining the building inspector or other designated officer from razing the building" within thirty days after service of the order.[2] The court must then hold a hearing within twenty days to determine whether the order to raze or repair the building is reasonable. WIS. STAT. § 66.0413(1)(h). "If the order is found reasonable the court shall dissolve the restraining order." ***Id.*** "If the order is found not reasonable the court shall continue the restraining order or modify it as the circumstances require." ***Id.***

¶5 The circuit court held a hearing on Lerch's complaint on April 12, 2013.[3] At the close of the hearing, the court adjourned the matter until May 17 to give Lerch additional time to complete the required repairs. A second hearing was held on May 17. At that hearing, both Lerch and a city building inspector testified regarding the condition of his property, and numerous photographs of the property were entered into evidence. Lerch also submitted receipts showing materials he

[2] In his complaint, Lerch asserted he "received" the January 24, 2013 order on January 30, 2013. The City does not dispute this assertion or argue that Lerch's complaint was untimely filed.

[3] For reasons not evident in the record, the hearing was not held within the twenty-day time limit set forth in WIS. STAT. § 66.0413(1)(h). However, neither party develops any argument that the circuit court's failure to comply with this time limit is relevant to our analysis. Accordingly, we do not address it further.

had purchased to repair the property. In addition, Lerch submitted a list of repairs he asserted were either fully or partially complete.

¶6 In its closing argument, the City argued its January 24, 2013 order to raze or repair Lerch's building was reasonable, and Lerch had failed to complete the required repairs within the specified time. As a result, the City asked the court to dissolve Lerch's restraining order. In response, Lerch conceded the repairs required by the January 24, 2013 order were reasonable, but he argued the thirty-day time limit to complete the repairs was unreasonable. The circuit court agreed that the order was reasonable, with the exception of the thirty-day time limit. The court therefore modified the order, giving Lerch until July 17, 2013, to complete the required repairs.

¶7 When issuing its oral decision, the court initially stated that, as of July 17, the restraining order would be "dissolved." The court told Lerch, "So, if you've got the repairs all done by July 17th, you are fine. They are obviously not going to order you to raze the building. If they're not, don't come back in to me and ask me for another thirty days or sixty days or whatever." The City then asked, "Your Honor, just to clarify that, are we having then another hearing on July 18th to make an evidentiary ruling on whether he's repaired or not, or is it just the subjective opinion of the City whether he repaired it or not?" The court responded, "I'm not going to set it for another hearing. If the City believes that the repairs aren't made, they can then request further calendaring." The court also clarified the City would have the right to inspect the building on July 17 to determine whether Lerch had made the necessary repairs.

¶8 On July 22, 2013, the City wrote to the circuit court, with a copy to Lerch, indicating the City had inspected Lerch's property on July 17 and

determined he failed to complete the necessary repairs. The letter also enclosed an email from Lerch, dated July 17, requesting more time to repair the building. In the email, Lerch conceded, "I have completed many of the items listed on the original January 24, 2013 Inspection orders, however there is still more work to be done." The City argued this email showed Lerch was aware the necessary repairs were incomplete. It therefore asked the circuit court to sign an enclosed order dissolving the restraining order.

¶9 On July 26, 2013, Lerch moved for a hearing to continue the restraining order. On July 30, he filed an affidavit in support of his motion. In the affidavit, Lerch averred fourteen of the nineteen repairs required by the January 24, 2013 raze or repair order were complete, three were ninety-percent complete, one was seventy-five percent complete, and one was fifty-percent complete.

¶10 Despite Lerch's request, the circuit court did not hold a hearing regarding the restraining order. Instead, on July 29, 2013, the court signed an ex parte order dissolving the restraining order, finding that Lerch had failed to make the necessary repairs. The court's order was filed on August 1, 2013. Lerch now appeals.

DISCUSSION

¶11 Lerch argues the circuit court erred by dissolving the restraining order that prohibited the City from razing his building. As explained above, a circuit court must dissolve an order restraining a municipality from razing a building if it concludes the municipality's original order to raze or repair the building was reasonable. *See* WIS. STAT. § 66.0413(1)(h). Whether an order to raze or repair a building is reasonable is a question of law. ***Village of Williams***

Bay v. Schiessle, 138 Wis. 2d 83, 88, 405 N.W.2d 695 (Ct. App. 1987). Although we typically review questions of law independently, "the finding of unreasonableness is so intertwined with the trial court's factual findings that we will give more credence to this legal determination by the trial court than we do with other legal questions." ***Id.***

¶12 On appeal, Lerch appears to raise nine arguments supporting his assertion that the circuit court should not have dissolved the restraining order.[4] We reject eight of these arguments, for the reasons explained below. However, we agree with Lerch that the court violated his right to due process by dissolving the restraining order without first holding a hearing.

I. The City's right to raze the building

¶13 Lerch first argues the circuit court erred by dissolving the restraining order because the City "should not have the right to now raze this building." In support of this argument, Lerch asserts the January 24, 2013 order was "a raze or repair order at the owner's option[,] … not a raze order as [the City] now contends." He argues the City could "only order the building razed under a raze or repair order" by proceeding under WIS. STAT. § 66.0413(1)(b)2., which authorizes

[4] To the extent Lerch raises arguments not identified in this opinion, we deem them undeveloped and decline to address them. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (we need not address undeveloped arguments).

Citing a number of federal cases, Lerch argues we must liberally construe his submissions because he is self-represented. However, that is not completely true under Wisconsin law. Wisconsin courts give leeway to filings submitted by pro se prisoners, *see* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 521-22, 335 N.W.2d 384 (1983), but we generally hold other pro se litigants to the same procedural and substantive standards as attorneys, *see* ***Waushara Cnty. v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992). "While some leniency may be allowed, neither a trial court nor a reviewing court has a duty to walk pro se litigants through the procedural requirements or to point them to the proper substantive law." ***Id.***

a municipality to order a building razed "[i]f there has been a cessation of normal construction … for a period of more than 2 years[.]"

¶14 We reject Lerch's argument that the City has no "right" to raze his building. Under WIS. STAT. § 66.0413(1)(b)1., if a building is "old, dilapidated or out of repair and consequently dangerous, unsafe, unsanitary or otherwise unfit for human habitation[,]" a municipality may order the owner to raze or repair the building, at the owner's option. "If the owner fails or refuses to comply within the time prescribed, the building inspector or other designated officer may proceed to raze the building[.]" WIS. STAT. § 66.0413(1)(f). Section 66.0413(1)(f) clearly gives the City the authority to raze Lerch's building if Lerch fails to complete repairs required by an order issued under § 66.0413(1)(b)1. The City was not required to proceed under § 66.0413(1)(b)2. in order to raze Lerch's building.

¶15 In a related argument, Lerch asserts the City intentionally misled the circuit court by "stat[ing] many times during the two hearing[s]" that it did not intend to raze his building. The record belies this assertion. During the April 12, 2013 hearing, the City asserted it did not want to raze Lerch's property because of its status as a historical building. However, the City confirmed razing the building was "an option" if Lerch failed to complete the necessary repairs. During the May 17, 2013 hearing, the City argued the restraining order preventing it from razing the building should be dissolved because the original raze or repair order was reasonable and Lerch had failed to make the required repairs. Contrary to Lerch's assertion, the City did not mislead the circuit court regarding its intent to raze his building.

II. Circuit court bias

¶16 Lerch also suggests the circuit court was biased against him. "The right to an impartial judge is fundamental to our notion of due process." ***State v. Goodson***, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385. Whether a judge was biased is a question of constitutional fact that we review independently. ***State v. Neuaone***, 2005 WI App 124, ¶16, 284 Wis. 2d 473, 700 N.W.2d 298. When reviewing a judicial bias claim, we presume a judge has acted fairly, impartially, and without bias. ***Goodson***, 320 Wis. 2d 166, ¶8. A defendant can rebut this presumption by showing either subjective or objective bias. ***Id.*** Subjective bias refers to the judge's own determination of whether he or she can act impartially. ***State v. Rochelt***, 165 Wis. 2d 373, 378, 477 N.W.2d 659 (Ct. App. 1991). Objective bias occurs either when the judge's actions create the appearance of bias or when there are objective facts showing the judge in fact treated a party unfairly. ***Goodson***, 320 Wis. 2d 166, ¶9.

¶17 Lerch never raised his claim of judicial bias in the circuit court.[5] Consequently, the court was never asked to determine whether it could proceed impartially. However, we may assume that, by presiding, the court implicitly determined it could act impartially. *See* ***State v. Carprue***, 2004 WI 111, ¶62, 274 Wis. 2d 656, 683 N.W.2d 31.

[5] The City suggests Lerch may have forfeited his judicial bias claim by failing to raise it in the circuit court. *See* ***State v. Dowdy***, 2012 WI 12, ¶5, 338 Wis. 2d 565, 808 N.W.2d 691 (We need not address arguments raised for the first time on appeal.). However, case law instructs that judicial bias is structural error that cannot be waived. *See* ***State v. Carprue***, 2004 WI 111, ¶¶57, 59, 274 Wis. 2d 656, 683 N.W.2d 31. We therefore address the merits of Lerch's claim.

¶18 Applying the objective test, Lerch has not met his burden to show either the appearance of bias or that the circuit court actually treated him unfairly. The only assertion Lerch makes in support of his judicial bias claim is that the court "allowed the City to control this case and had the City tell the court what to do." However, the portions of the record Lerch cites do not support this assertion. They merely show that the court questioned the City in attempt to clarify its positions on certain issues. This evidence is insufficient to rebut the presumption that the court acted fairly and impartially. We therefore reject Lerch's judicial bias claim.

III. Time limit for completing repairs

¶19 Lerch next argues the circuit court should not have dissolved the restraining order based on its finding that he did not complete the necessary repairs because "[n]owhere in the Wisconsin Statutes is there a time limit for a raze or repair order to be completed." Lerch seems to suggest that, because the statutes do not set forth a specific time limit in which building owners must complete repairs, a municipality may not raze a building as long as the owner continues working on the property.

¶20 We need not address this argument because Lerch failed to raise it in the circuit court. *See* ***State v. Dowdy***, 2012 WI 12, ¶5, 338 Wis. 2d 565, 808 N.W.2d 691 (We need not address arguments raised for the first time on appeal.). Moreover, the argument fails on the merits because it ignores WIS. STAT. § 66.0413(1)(f). Section 66.0413(1)(f) requires any order issued under WIS. STAT. § 66.0413(1)(b) to specify "the time within which the owner of the building is required to comply with the order[.]" It allows the building to be razed "if the owner fails or refuses to comply within the time prescribed[.]" WIS. STAT.

§ 66.0413(1)(f). Thus, contrary to Lerch's assertion, a building owner is clearly not entitled to an unlimited amount of time to complete repairs.

IV. Lack of testimony from outside contractors

¶21 During the May 17, 2013 hearing, a city building inspector testified some of the repairs Lerch had already made to the building were done improperly. Lerch complains that the City "presented no written estimates or testimony from any outside contractor" regarding the quality of the repairs. However, Lerch does not cite any legal authority requiring the City to present testimony from an outside contractor on this issue. His argument is therefore undeveloped, and we decline to address it. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994). In addition, Lerch never argued in the circuit court that the City was required to present testimony from an outside contractor. He has therefore forfeited his right to raise this argument on appeal. *See* ***Dowdy***, 338 Wis. 2d 565, ¶5.

V. Order allowing continued inspection of the building

¶22 Lerch next argues the circuit court erred by "granting the [C]ity permission to continue inspecting the building during the time the restraining order was in effect[.]" He asserts, "This was done to give the [C]ity an additional chance to find problems for future repair orders[.]" He argues this practice violated WIS. STAT. § 66.0413(1)(h), which states:

> If the court finds that the [raze or repair] order is unreasonable, the building inspector or other designated officer shall issue no other order under this subsection in regard to the same building until its condition is substantially changed. The remedies provided in this paragraph are exclusive remedies and anyone affected by an order issued under par. (b) is not entitled to recover any damages for the razing of the building.

¶23 We reject Lerch's argument that the circuit court erred by allowing the City to continue inspecting his building. Lerch does not explain why he believes the court's order violated WIS. STAT. § 66.0413(1)(h). *See* ***Flynn***, 190 Wis. 2d at 39 n.2. Based on the statute's plain language, we do not perceive any violation. Further, while Lerch argues the purpose of these inspections was to find problems to justify future repair orders, no future repair orders were considered by the circuit court in its decision to dissolve Lerch's restraining order. Whether the inspections were properly allowed is therefore irrelevant to the dispositive issue in this appeal.

VI. Equal protection violation

¶24 Lerch also contends the City "has never razed a building when the repair[] orders are being done with the exception of three of [Lerch's] other properties." He therefore argues the City's efforts to dissolve the restraining order in this case violated his right to equal protection under the federal and state constitutions. However, Lerch does not cite any evidence supporting his assertion that the City has never razed a building belonging to any other owner while that owner was working to repair the property. In addition, while Lerch baldly asserts the City violated his right to equal protection, he does not identify the legal standard for establishing an equal protection violation, much less explain why he believes the City's actions met this standard. Lerch's two-sentence equal protection argument is woefully underdeveloped, and we therefore decline to address it. *See* ***Flynn***, 190 Wis. 2d at 39 n.2.

VII. Human habitation

¶25 Lerch next suggests the City could not order him to raze or repair his building under WIS. STAT. § 66.0413(1)(b)1. because he was using the building for

"personal storage" rather than human habitation. However, § 66.0413(1)(b)1. allows a municipality to issue a raze or repair order when it finds that "*a building*" is "old, dilapidated or out of repair and consequently dangerous, unsafe, unsanitary or otherwise unfit for human habitation[.]" (Emphasis added.) The term "building" is defined as "any building or structure or any portion of a building or structure." WIS. STAT. § 66.0413(1)(a)1. Thus, "any building" may be subject to a raze or repair order under § 66.0413(1)(b)1., regardless of whether the building is used for human habitation. Accordingly, that Lerch's property is currently used for personal storage, rather than human habitation, does not make the City's order to raze or repair the building unreasonable.

¶26 In addition, during the May 17, 2013 hearing, Lerch described the second floor of the building as "a private residential[.]" He later clarified that he used to live on the second floor of the building, and all of his personal belongings remain there. He further stated the second floor is "still listed as a residence." When asked whether anyone currently resides on the second floor of the building, Lerch responded, "No. Because electricity's been turned off." These statements show that the second floor of Lerch's building has been used for human habitation in the past. They also strongly suggest the building could be used for human habitation in the future. Thus, the building's use is consistent with human habitation, even though the building may be unoccupied at present. Lerch's argument that a building must be currently inhabited for WIS. STAT. § 66.0413(1)(b)1. to apply is absurd when the building is one that has traditionally been used as a dwelling.

VIII. WISCONSIN STAT. § 66.0413(1)(c)

¶27 Lerch also argues the circuit court should not have dissolved the restraining order because the City failed to prove, pursuant to WIS. STAT. § 66.0413(1)(c), that the cost of repairing his building would exceed fifty percent of its assessed value. However, the City was not required to make this showing because § 66.0413(1)(c) is inapplicable. Under § 66.0413(1)(b)1., a municipality may order an unsafe building razed, without giving the owner the option to repair, if the municipality determines the necessary repairs would be unreasonable. Section 66.0413(1)(c), in turn, provides that repairs are presumed unreasonable for purposes of paragraph (b)1. if their cost would exceed fifty percent of the building's assessed value. Here, the City gave Lerch the option to repair his building and did not assert that repairing the building would be unreasonable. Consequently, § 66.0413(1)(c) does not apply.

IX. Due process violation

¶28 Finally, Lerch contends the circuit court violated his right to due process when it dissolved the restraining order, based on representations in a letter received from the City, without giving Lerch an opportunity to respond to those assertions at a hearing.[6] Whether a party has been denied his or her right to due process presents a question of law that we review independently. ***City of S. Milwaukee v. Kester***, 2013 WI App 50, ¶13, 347 Wis. 2d 334, 830 N.W.2d 710. "Procedural due process means that persons whose rights may be affected [by a

[6] The City suggests Lerch may have forfeited his due process argument by failing to raise it in the circuit court. We disagree. Lerch challenges the procedure the circuit court used to issue its final order. He never had the opportunity to raise his due process argument in the circuit court, so he cannot have forfeited his right to raise it on appeal.

government action] are entitled to be heard, and in order that they may enjoy that right, they must first be notified[.]" ***State v. Thompson***, 2012 WI 90, ¶46, 342 Wis. 2d 674, 818 N.W.2d 904 (quoting 16C C.J.S. *Constitutional Law* § 1444, at 188 (2005) (emphasis omitted)).[7]

¶29 We agree with Lerch that the circuit court violated his right to due process by granting the City's request to dissolve the restraining order without first holding a hearing. At the May 17, 2013 hearing, the court initially stated that, as of July 17, the restraining order would be "dissolved," and if Lerch had not completed the required repairs, the City could raze the building. However, the City then asked the court to clarify whether it planned to hold an evidentiary hearing after July 17 to determine whether Lerch had completed the repairs. The court responded, "I'm not going to set if for another hearing. *If the City believes that the repairs aren't made, they can then request further calendaring.*" (Emphasis added.) Based on this remark, a reasonable person in Lerch's position would conclude the City was required to request further calendaring in order to obtain an order dissolving the restraining order. We therefore conclude Lerch was deprived of notice that the court would dissolve the restraining order without first holding a hearing.

¶30 We also conclude Lerch was deprived of a meaningful opportunity to be heard. The letter the City sent to the circuit court asserted the City had inspected Lerch's property on July 17, 2013 and "confirmed that all necessary

[7] A government action violates a party's right to substantive due process if it is so arbitrary or wrongful that it "'shocks the conscience ... or interferes with rights implicit in the concept of ordered liberty.'" ***State v. Schulpius***, 2006 WI 1, ¶33, 287 Wis. 2d 44, 707 N.W.2d 495 (quoted source omitted). We do not understand Lerch to be asserting a substantive due process claim, and we therefore restrict our analysis to procedural due process.

repairs were not made." Lerch should have had an opportunity to respond to this assertion. Admittedly, the City's letter enclosed an email from Lerch, in which he conceded, "I have completed many of the items listed on the original January 24, 2013 Inspection orders, however there is still more work to be done." However, based on this email, the court had no way of knowing how much of the work remained incomplete, whether Lerch had substantially complied with the court's previous order, or whether Lerch had a valid reason for failing to complete the necessary repairs. Lerch should have had a chance to present evidence on these topics at a hearing. Although Lerch filed an affidavit in support of his motion for a hearing on July 30, it appears the court never considered his affidavit because it signed the order dissolving the restraining order on July 29.

¶31 Because Lerch was deprived both of notice and a meaningful opportunity to be heard, we conclude his right to due process was violated. We therefore reverse the circuit court's order dissolving the restraining order and remand for a hearing on whether the restraining order should be dissolved.

By the Court.—Order reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.