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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001418-MR

EDITH UTTERBACK — APPELLANT

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE JAMES C. BRANTLEY, JUDGE
ACTION NO. 11-CI-00114

CITY OF EARLINGTON, AND
HOPKINS COUNTY, KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS AND THOMPSON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Edith Utterback appeals from an order of the Hopkins Circuit Court denying her motion to vacate a summary judgment and order of sale. The judgment and order of sale allowed the City of Earlington to

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

enforce and foreclose nuisance liens filed against Utterback's properties. Upon a thorough review of the record, we reverse and remand to the Hopkins Circuit Court.

History

On January 3, 2011, the City of Earlington filed two nuisance liens against two different tracts of real property in Hopkins County, both of which were owned by Utterback. The properties in question, according to the affidavit of the City's Code Enforcement Officer, were in a serious state of disrepair. Complaints were made by neighbors concerning high grass and trash and debris in the yard. The properties reportedly contained junk such as tires and blocks. Further, the homes appeared to be uninhabitable.

On February 9, 2011, the City of Earlington filed suit to enforce the liens on the properties. The liens were in the amount of $6,300.00 and $2,200.00, respectively, for a total of $8,500. A hearing was set for March 21, 2011. On that date, Utterback appeared *pro se* and indicated that she would attempt to abate the nuisances on the subject properties. The hearing was rescheduled for April 18, 2011. On April 18, the nuisances not having been abated to the City's satisfaction, the court entered a judgment and order of sale in favor of the City of Earlington.

Thereafter, Utterback obtained counsel who filed a motion to vacate. In the motion, counsel stated that Utterback was denied due process under the Fourteenth Amendment as she was deprived of her right to property without first being given notice and the opportunity to be heard. Attached to the motion was an

affidavit by Utterback stating that she had difficulty maintaining the properties due to her health conditions, but that the properties were "well groomed and maintained" as of the date of the affidavit, and she had paid all delinquent city and county taxes thereon. The court denied the motion to vacate, noting that Utterback had "been given numerous opportunities to correct the nuisances" and that her properties had "gone for years without being properly maintained, and without proper water and sewage."[2]

Utterback now appeals to this Court.

Analysis

On appeal, Utterback argues that the City never "explained, detailed, or accounted" for the amounts of the liens it imposed, that the City never furnished a beginning date or ending date for when the per diem penalties were assessed, that the City never expended any of its own resources to abate the nuisances, that she never received a final order of the Code Enforcement Board, that she was never given the opportunity for a hearing, and generally, that she was deprived of her Fourteenth Amendment right to due process of law.

Upon review of a summary judgment, we ask whether the trial court properly determined that there were no genuine issues as to any material fact and

[2] Months after the underlying civil suit had been filed, the Assistant County Clerk sent a letter to Utterback indicating that testing had been performed which showed Utterback had not maintained a proper sewer line to the subject properties. The Assistant County Clerk indicated that no water service had run to one of the properties since 2007 and that no water service had run to the other since March of 2009. Nonetheless, the complaint was never amended to include these violations and they were not considered by the Code Enforcement Board prior to the liens, as the information was not made known until April of 2011.

that the movant was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. We owe no deference to the trial court when making this inquiry. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky.App. 2000).

> Under KRS 381.770(2), it is
>
> unlawful for the owner, occupant or person having control or management of any land within a city, county, consolidated local government, urban-county, or unincorporated area to permit a public nuisance, health hazard, or source of filth to develop thereon through the accumulation of:
>
> (a) Junked or wrecked automobiles, vehicles, machines, or other similar scrap or salvage materials . . .
>
> . . . .
>
> (c) Rubbish; or
>
> (d) The excessive growth of weeds or grass.

Id. Further, it is also unlawful for

> the owner of a property to permit any structure upon the property to become unfit and unsafe for human habitation, occupancy, or use or to permit conditions to exist in the structure which are dangerous or injurious to the health or safety of the occupants of the structure, the occupants of neighboring structures, or other residents of the city, county, consolidated local government, or urban-county.

KRS 381.770(4). A city or local government may establish "reasonable standards and procedures" to enforce the above two subsections. KRS 381.770(5). However, before any action is taken under these subsections, proper notice must be given to the property owner(s). *Id*. In addition, the City of Earlington's General Regulations provide that "[a]ny person or business entity noticed or cited for a violation of [the nuisance provisions] shall be entitled to a hearing before the Code Enforcement Board . . . ." *City of Earlington General Regulations* §92.51.

Under, KRS 381.770(7):

> A city, county, consolidated local government, or urban-county **shall have a lien against the property for the reasonable value of labor and materials used in remedying the situation**. The affidavit of the responsible officer shall constitute prima facie evidence of the amount of the lien and the regularity of the proceedings pursuant to this statute, and shall be recorded in the office of the county clerk. . . .

Id. (Emphasis added). Thus, a lien against real property for a nuisance violation must consist of the reasonable value of labor and materials expended.

Further, if a lien is attached to real property under subsection (5) or subsection (7) of this statute,

> the owner of [the] property upon which [the] lien has been attached pursuant to this section shall be personally liable for the amount of the lien, including all interest, civil penalties, and other charges and the city, county, or urban-county may bring a civil action against the owner and shall have the same remedies as provided for the recovery of a debt owed. The failure of a city, county, consolidated local government, or urban-county government to comply with subsection (6) of this section

> . . . shall not limit or restrict any remedies that the city, county, consolidated local government, or urban-county government has against the owner of the property.

KRS 381.770(9). From the foregoing it is clear that civil penalties and fines may be imposed upon property owners for violation of the nuisance statute. However, as noted above, the amount of any liens against the real property may be comprised only of the reasonable value of materials and labor spent remedying a nuisance. The amount of any civil fines or penalties is not recoverable by means of a lien on the real property under KRS 381.770.

Finally, Subsection (6), as referenced above, requires that,

> [u]nless imminent danger exists on the subject property that necessitates immediate action, the city, county, consolidated local government, or urban-county government shall send, within fourteen (14) days of a final determination after hearing or waiver of hearing by the property owner, a copy of the determination to any lien holder of record of the subject property by first-class mail with proof of mailing. The lien holder of record may, within forty-five (45) days from receipt of that notice, correct the violations cited or elect to pay all fines, penalty charges, and costs incurred in remedying the situation as permitted by subsection (7) of this section.

KRS 381.770(6).

It is undisputed that the amounts of the liens in the present case are comprised solely of per diem penalties, and not for any amount spent by the City of Earlington in abating the nuisances. This is in violation of KRS 381.770(7). Further, it is undisputed that Utterback was not given the opportunity for a hearing before the liens and penalties were imposed. Upon a review of the record, we can

find neither a notice with proof of mailing or a final order of the Code Enforcement Board. Section 92.99 of the City of Earlington's General Regulations clearly states that the $50 per diem civil penalty *only* applies when a property owner fails to comply with a final order of the Code Enforcement Board. Upon a review of the record, it appears that Utterback was not given *any* notice until January 3, 2011, when liens in the amount of $8,500 were filed with the county clerk.

While we appreciate that cities and localities must be able to enforce the nuisance statute and their own accompanying local regulations through the imposition of civil penalties and fines, such cities and localities cannot do so without first giving proper notice to landowners. Further, as stated above, the amount of any liens against real property under KRS 381.770 are to be comprised solely of amounts expended by a city or locality in abating a nuisance. While a city may certainly bring a civil suit to recoup any civil penalties or fines assessed under local regulations, such amounts are not properly included in a lien under the statute. Finally, the City of Earlington's General Regulations make clear that civil fines and penalties may only be assessed when an individual fails to comply with a final order of the Code Enforcement Board. *City of Earlington General Regulations* §92.99.

Hence, we reverse and remand to the Hopkins Circuit Court with directions to dismiss the suit against Utterback. All liens pertaining to this nuisance violation shall be released on the real property records. Thereafter, the City shall be free to give Utterback notice of any nuisance violations regarding her

properties in Earlington, assuming they still exist, and proceed according to the statutory and regulatory procedures as outlined above. At a minimum, notice must be given and proof of mailing shall be filed of record, the Code Enforcement Board must offer Utterback the chance for a hearing pursuant to §92.51, and Utterback must be provided with a final order before civil penalties may be assessed. If the City thereafter expends any monies to remedy or abate the nuisance, it shall be entitled to a lien on the properties for the reasonable amounts expended. Further, if civil penalties are assessed after a final order of the Code Enforcement Board, the City may seek to collect those amounts according to law.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas E Springer III
Madisonville, Kentucky

BRIEF FOR APPELLEE:

J. Keith Cartwright
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