

IN THE COURT OF APPEALS OF IOWA

No. 1-663 / 10-1600
Filed December 7, 2011

C. LINE, INC.,
Plaintiff-Appellee,

vs.

CRAIG MALIN and
CITY OF DAVENPORT,
Defendants-Appellants.

Appeal from the Iowa District Court for Scott County, James E. Kelley and
Marlita A. Greve, Judges.

Parties appeal and cross-appeal from the district court's rulings on
motions for summary judgment. **AFFIRMED.**

Brian Heyer, Assistant City Attorney, Davenport, for appellants.

Michael J. Meloy, Bettendorf, and John T. Flynn, Davenport, for appellee.

Heard by Danilson, P.J., and Tabor and Mullins, JJ.

MULLINS, J.

This is an appeal and cross-appeal from summary judgment rulings in an action for certiorari, declaratory relief, mandamus, and injunctive relief following the City of Davenport's denial of a license application to C. Line for an adult cabaret business. For the reasons stated herein, we affirm the rulings of the district court.

I. Background Facts and Prior Proceedings.

In February 1997, C. Line opened an adult cabaret business called "Chorus Line" at 4128 North Brady Street in Davenport. In 2001, the City of Davenport adopted ordinance No. 2001-228 establishing chapter 5.16 in the Davenport Municipal Code to provide for the licensing and regulation of "adult entertainment" businesses.

In October 2003, C. Line filed a petition in federal court seeking declaratory and injunctive relief claiming chapter 5.16 of the Davenport Municipal Code was unconstitutional. This lawsuit was resolved in August 2004 when the parties entered into a consent decree. See *C. Line, Inc. v. City of Davenport*, No. 303-CV90113 (S.D. Iowa, Aug. 20, 2004). The consent decree approved by the federal court provided in pertinent part:

1. The City of Davenport will issue an adult cabaret license to C. Line, Inc., d/b/a Chorus Line; § 5.16.120 notwithstanding.^[1] Said license shall be subject to the regulations of Chapter 5.16 and shall be renewable as provided thereunder.
2. C. Line, Inc. shall be allowed to amend its corporate structure, if necessary, such that the majority interest in C. Line,

¹ Davenport Municipal Code section 5.16.120 limited the number of adult cabaret business licenses that could be issued to three. Since three other businesses had already received adult cabaret licenses, this permitted C. Line to have a fourth.

Inc., the owner of the adult cabaret license, may be sold or transferred to any otherwise qualified person or entity pursuant to Chapter 5.16 of the Davenport Municipal Code.

3. The Chorus Line is a pre-existing non-conforming use . . .

. . . .

5. The provisions of Chapter 5.16 may be enforced by the City of Davenport, except as modified by this Consent Decree

Id.

At the time of the federal consent decree, C. Line was owned by Michael Cline. In 2007, Cline sold C. Line to Larry Starkman, Michael Siegel, and Steven Brown. In late November 2008, C. Line voluntarily closed Chorus Line. In December 2008, Chorus Line was evicted from 4128 Brady Street by a forcible entry and detainer petition granted in favor of the landlord.

In early 2009, the corporate ownership of C. Line was transferred to Nadeem Mazhar. On July 28, 2009, C. Line applied to the City of Davenport for an adult entertainment license as a part of reopening the adult cabaret business. The application was initially submitted to the fire, police, and community planning and economic development departments for review. Each department recommended approval. The application was then returned to the finance department for the issuance of the license.

On September 21, 2009, while the application was pending before the finance department, Craig Malin, city administrator for the City of Davenport, performed a site inspection of 4128 North Brady Street. Located within the same building as C. Line was the business, Dr. John's Lingerie Boutique. Dr. John's opened in August 2008, and has operated under a retail business license issued by the City of Davenport since that time. Dr. John's sells lingerie, shoes, and hosiery as well as novelties, movies, and magazines of a sexual nature.

After observing Dr. John's advertising and merchandise, Malin returned to City Hall where he met with senior manager of the Community Planning and Economic Development Department, Matt Flynn, and corporation counsel, Tom Warner. A letter was then drafted under Warner's guidance denying C. Line's adult cabaret license as violating Davenport Municipal Code section 17.47.030(B) prohibiting two adult entertainment businesses from being located on the same lot or within 500 feet of each other. The letter was presented to the chief financial officer, Alan Guard, who signed it and mailed it by certified mail to Mazhar on September 24, 2009.

On October 9, 2009, C. Line appealed Guard's license denial pursuant to Davenport Municipal Code section 5.16.050(F), which permitted license denials to be appealed to the city administrator or his designee. An administrative appeal hearing was presided over by Malin on October 22 and 23, 2009. Prior to the hearing, C. Line filed a written objection to Malin acting as the hearing officer and moved that he recuse or disqualify himself. This objection was renewed twice during the hearing. Malin denied each of the requests.

At the hearing, the City of Davenport's only witness was Tom Warner. He testified that on October 20, 2009, he went to Dr. John's to perform an inspection and took several photos showing various merchandise in the store. Based on his observations, Warner testified that it was his belief that Dr. John's was an "adult

store.”² Warner did not make any square footage measurements or count any inventory.

C. Line called several witness during the hearing including the store manager for Dr. John’s, Kelly Smith. Smith testified that Dr. John’s currently has a retail business license, and that at no point in time has the City of Davenport required the store obtain an adult entertainment business license. She further stated that several of the lingerie and novelty items could be found at similar retail stores, like Victoria’s Secret and Spencer Gifts in NorthPark Mall. It was Smith’s opinion that Dr. John’s was not an “adult store.” After both direct and redirect examination, the assistant city attorney offered no questions for cross-examination. However, Malin asked several questions directed primarily at whether Smith believed the store was suitable for children. Smith testified these questions mirrored questions Malin asked to her staff during his September 21 inspection.

Matt Flynn also testified at the hearing. He stated he signed off on C. Line’s license application for the land and use department after looking in the windows of Dr. John’s, but never setting foot inside.

² Under chapter 5.16, “adult entertainment” businesses subject to regulation and licensing include “adult stores.” Davenport Mun. Code § 5.16.020(D). An “adult store” is defined as

any commercial establishment that . . . as a substantial or significant portion of its business offers for sale, rental, exchange or viewing any adult materials. Adult stores do not include commercial establishments that offer for sale, rental, exchange or viewing any adult materials as a sideline or adjunct to sales, rentals, exchanges or viewings of materials other than adult materials.

Id. § 5.16.020(I).

Alan Guard also testified that he never inspected Dr. John's. His rejection letter reveals it was based entirely on information obtained during the site inspection performed by Malin on September 21.

Following the conclusion of the hearing, Malin performed a "follow up" site inspection of Dr. John's to ascertain the approximate percentage of adult material for sale in the store. This inspection was done without the knowledge and consent of C. Line. Based upon his measurements, calculations, and direct observations of the store's space and displays, Malin concluded that Dr. John's was an "adult store" and upheld the denial of C. Line's adult cabaret license application. Malin made no attempt to address C. Line's argument that it was a legal preexisting nonconforming use.

On November 13, 2009, C. Line filed a four-count petition seeking a writ of certiorari, a declaratory judgment, a writ of mandamus, and temporary and permanent injunctions. For its certiorari claim, C. Line asserted Malin and the City of Davenport acted illegally in denying its license application, and that the appeal to Malin was a "sham proceeding that violated Plaintiff's procedural and substantive due process rights." C. Line requested the administrative order denying its license be rendered null and void, and that they be awarded attorneys fees, costs, and other just and equitable relief. For its declaratory judgment claim, C. Line sought a determination as to whether it had a valid and existing adult entertainment business license as a legal nonconforming use that allowed it to open its business immediately. C. Line also requested a writ of mandamus be issued commanding the City of Davenport issue the license. C. Line further

sought temporary and permanent injunctive relief arguing Malin and the City of Davenport's actions have caused and will be the proximate cause of substantial and continuous economic loss due to the delay in opening its business.

Later that day, the district court granted an ex parte temporary injunction staying the one-year time limit for maintaining a nonconforming use during the pendency of the litigation. This temporary injunction was confirmed, following a contested hearing, in a ruling filed on November 30, 2009.

On December 28, 2009, C. Line filed for summary judgment. After hearing arguments from the parties, the district court decided:

In this case, the record is quite clear from both the transcript and the written decision that Defendant Craig Malin assumed a personal commitment to a particular result, that is, the denial of the license. The investigating done by Craig Malin both before the hearing and after the hearing, and the questioning of at least one witness after the Assistant City Attorney had concluded cross examination of that witness, indicate a personal bias toward an outcome desired by Defendant Malin. This combination of all three functions of investigation, advocacy and adjudication, has the appearance of fundamental unfairness in this administrative hearing, thus vitiating its legal effect.

Accordingly, the district court sustained C. Line's requested writ of certiorari and ordered the license appeal be determined before a court-appointed special master. The district court further determined that sustaining the requested writ of certiorari made a ruling on C. Line's application for declaratory judgment not yet ripe for decision. The district court did not address C. Line's mandamus or injunction claims.

C. Line subsequently filed a motion to enlarge or amend the district court's ruling pursuant to Iowa Rule of Civil Procedure 1.904(2). In its motion, C. Line

requested the district court address its declaratory judgment, mandamus, and injunction claims.

While the first motion for summary judgment was pending, C. Line filed a motion to bifurcate trial on the issue of damages. This request was granted on June 21, 2010.

On September 22, 2010, the district court entered a ruling on C. Line's motion to enlarge. The district court determined that based on the 2004 federal consent decree,

C. Line has a valid and existing Adult Entertainment Business License, which does not need to be renewed under Chapter 5.16 of the City of Davenport Code and further that C. Line can immediately open its cabaret business at 4128 Brady Street, Davenport, Iowa as a legal nonconforming use without the necessity of obtaining a renewed license from the City

The district court further ordered the issuance of a writ of mandamus to enforce the declaratory judgment ruling. Based upon these findings, the district court found the writ of certiorari was rendered moot, and that there was no further need for a temporary or permanent injunction, except that the temporary injunction would remain in place until the case concluded all stages of litigation and any possible appeal. Finally, the district court denied awarding C. Line any damages or attorney fees on the grounds that C. Line had failed to provide the court with any substantive legal analysis or support for them to be awarded.

On September 29, 2010, Malin and the City of Davenport filed a notice of appeal. The following day, C. Line filed a second 1.904(2) motion to reconsider arguing Malin and the City of Davenport violated its procedural and substantive due process rights and therefore they were liable for damages under 42 U.S.C.

§ 1983 and attorney fees under 42 U.S.C. § 1988. C. Line requested the court enter an order finding Malin and the City of Davenport liable as a matter of law, and withdraw its previous ruling on damages so they can be preserved for the already bifurcated trial on damages. The district court refused to rule on C. Line's rule 1.904(2) motion finding it had been divested of jurisdiction by the pending appeal.

C. Line then filed a motion with our supreme court seeking a stay of the pending appeal and a limited remand so the district court could rule on its second rule 1.904(2) motion. The supreme court granted the limited remand request on November 2, 2010.

On December 7, 2010, the district court determined that it could not make a finding establishing Malin and the City of Davenport's liability regarding due process violations on the summary judgment record only. The district court found that liability shall be considered in the separate trial with C. Line's claims for damages. The court further amended its second ruling on summary judgment by deleting its references denying damages and attorney fees and to preserve them for the separate trial as well. Malin and the City of Davenport have appealed, and C. Line has cross-appealed the rulings of the district court.

II. Issues on Appeal.

In their appeal, Malin and the City of Davenport argue: (1) the exclusivity of remedies rule prevented C. Line from seeking declaratory relief, (2) C. Line was not a legal nonconforming use, and (3) C. Line's due process rights were not violated.

C. Line cross-appeals arguing the district court erred by: (1) not granting it a permanent injunction, and (2) not finding Malin and the City of Davenport liable as a matter of law for violating its procedural and substantive due process rights.

III. Standard of Review.

All the rulings of the district court were granted during the summary judgment stages of litigation. Thus, our review is for the correction of errors at law. *Annett Holdings, Inc. v. Kum & Go, L.C.*, 801 N.W.2d 499, 502 (Iowa 2011). Summary judgment is only appropriate if the record shows there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3). The nonmoving party should be afforded every legitimate inference that can be reasonably deduced from the evidence, and if reasonable minds can differ on how the issue should be resolved, a fact question is generated. *Hills Bank & Trust Co. v. Converse*, 772 N.W.2d 764, 771 (Iowa 2009). However, when the only issue is the legal consequences flowing from undisputed facts, summary judgment is proper. *Peak v. Adams*, 799 N.W.2d 535, 542 (Iowa 2011).

IV. Malin and the City of Davenport's Appeal.

A. Exclusivity of Remedies. The City of Davenport first contends that the availability of certiorari precludes C. Line from seeking declaratory relief. The City argues that because C. Line would be granted a license if it is successful on the rehearing before a special master, certiorari provides complete relief.

Under the exclusivity of remedies doctrine, a court

will permit a declaratory judgment as a claim for relief from an action of an administrative board as a companion or alternative claim to a statutory certiorari action if: (1) the statutory remedy of certiorari will not afford complete relief, and (2) the legislature did not intend certiorari to be the exclusive remedy.

City of Johnston v. Christenson, 718 N.W.2d 290, 296 (Iowa 2006).

Although we recognize the arguments made may be the same in both the certiorari and declaratory judgment claims, we nonetheless find that the exclusivity of remedies doctrine does not apply to the declaratory judgment action in this case. Here, C. Line sought certiorari alleging Malin and the City of Davenport acted illegally in denying its license application, but sought a declaratory judgment to determine whether the 2004 federal consent decree provided an existing license and the status of a legal nonconforming use. Thus, the certiorari claim sought to remedy an alleged wrong, while the declaratory judgment claim sought interpretation of the parties' rights and obligations under a court decree. See *id.* at 297 (holding the exclusivity-of-remedies doctrine did not apply to the declaratory-judgment action brought by a city because the city was not pursuing declaratory relief as a remedy from action taken by the board of adjustment, but as a means to determine its separate obligation to exercise its site-plan authority). Because we find the declaratory judgment claim was not barred, we proceed to determine whether the district court properly granted C. Line's motion for summary judgment on its claims for declaratory judgment and mandamus.

B. Declaratory Judgment and Mandamus. The City of Davenport contends the district court erred in granting C. Line's motion for summary judgment because there were disputed facts as to whether C. Line had a legal

nonconforming use. However, the City does not point to any factual disputes in the record; rather, it argues the nonconforming use ended either when C. Line ceased operations in November 2008 or when the forcible entry and detainer petition was granted in December 2008. Both of these incidents are undisputed; therefore, we must determine what the legal consequences of the cessation in operation and the eviction had on the property's status as a nonconforming use. This is a legal argument appropriate for summary judgment, which we now address. *Peak*, 799 N.W.2d at 542.

It is undisputed that the express words of the 2004 federal consent decree provided C. Line with an adult cabaret license and the status of a preexisting nonconforming use. As a nonconforming use, C. Line was permitted to continue until legally abandoned. *City of Okoboji v. Okoboji Barz, Inc.*, 746 N.W.2d 56, 60 (Iowa 2008). Abandonment is established by Davenport Municipal Code section 17.46.020, which provides:

In the event that a nonconforming use of any building or premises is discontinued or its normal operation stopped for a period of one year, the use of the same shall thereafter conform to the regulations of the district in which it is located.

This ordinance does not require any subjective intent, but effectively extinguishes nonconforming uses based solely on discontinuance of the use for a specified period of time. *Smith v. Bd. of Adjustment*, 460 N.W.2d 854, 857 (Iowa 1990).

In this case, C. Line voluntarily ceased operations in November 2008 and was evicted in December 2008. However, C. Line sought to reopen in July 2009. Under both the voluntary closure and the eviction, C. Line did not stop using 4128 Brady Street as an adult cabaret for over one year. Accordingly, C. Line

did not legally abandon its status as a nonconforming use under the Davenport Municipal Code.

The City recognizes that C. Line sought to resume the adult cabaret as a nonconforming use within the one-year time period, but claims the nonconforming use was no longer C. Line's. The City argues that because nonconforming uses run with the land, when C. Line was evicted, the status of a nonconforming use became the landlord's, who in turn gave it Dr. John's, who was also allegedly operating an "adult store" at 4128 Brady Street. We disagree with the City's argument.

Although possession may have been transferred from C. Line in December 2009, C. Line reestablished possession of the land prior to the one-year expiration date. Thus, as found above, C. Line did not lose its status as a nonconforming use. In addition, the nonconforming use does not "leapfrog" to Dr. John's, because to do so would be an impermissible expansion of the nonconforming use by the landlord. *Perkins v. Madison County Livestock & Fair Ass'n*, 613 N.W.2d 264, 270 (Iowa 2000). Further, the argument is premised on a finding that Dr. John's was an "adult store." However, at no point has the City required Dr. John's to seek or obtain an adult entertainment license, and to allow the City to change Dr. John's business status from retail to adult in a collateral proceeding in which Dr. John's was not a party would raise serious due process concerns.

We find the district court correctly granted C. Line declaratory relief because C. Line did not legally abandon its status as a nonconforming use. In

addition, because it is undisputed that C. Line had a valid and existing adult entertainment license, and that Mazhur properly complied with all requirements upon a change in composition in corporate ownership, we find the district court properly issued a writ of mandamus compelling the City of Davenport to issue C. Line an adult entertainment license. See Iowa Code § 661.5 (stating an order of mandamus may be issued as auxiliary relief to compel the performance of a duty established in such an action).

C. Writ of Certiorari. Malin and the City of Davenport further argue the district court erred in determining that Malin's actions in pre- and post-hearing investigation, in questioning witnesses during the administrative hearing, and in adjudicating the administrative appeal of the license denial violated C. Line's due process rights. However, because we have found C. Line is entitled to open its adult cabaret business immediately as a legal nonconforming use with an existing adult entertainment license, an administrative hearing on the license denial is no longer needed and granting certiorari relief would have no practical effect. Thus, the request for a writ of certiorari has been rendered moot. *Baker v. City of Iowa City*, 750 N.W.2d 93, 97-98 (Iowa 2008).

V. C. Line's Cross-Appeal.

A. Permanent Injunction. C. Line argues the district court erred in not granting its request for a permanent injunction. C. Line claims a permanent injunction is needed to prevent Malin and the City of Davenport from future interference with C. Line's right to operate its cabaret business once opened.

“Permanent injunctive relief is an extraordinary remedy that is granted only when there is no other way to avoid irreparable harm to the plaintiff.” *Lewis Investments, Inc. v. City of Iowa City*, 703 N.W.2d 180, 185 (Iowa 2005). We agree with the district court that permanent injunctive relief is not warranted in this case. We have upheld the declaratory judgment and mandamus rulings providing C. Line with a valid and existing license and the status of a nonconforming use. C. Line has adequate remedies available at law. *Sergeant Bluff-Luton Sch. Dist. v. City of Sioux City*, 562 N.W.2d 154, 156 (Iowa 1997). The issuance of an injunction under these circumstances would be more punitive than remedial. *City of Ottumwa v. Hill*, 567 N.W.2d 424, 427 (Iowa 1997).

B. Due Process Claims. Although the writ of certiorari has been rendered moot, we must still address C. Line’s claims that its procedural and substantive due process rights were violated, thus entitling it to a judgment on liability and further proceedings on damages only. C. Line’s four-count petition repeated alleged due process violations under both the state and federal constitutions, and requested attorney fees, costs, and damages. *Cunha v. City of Algona*, 334 N.W.2d 591, 596 (Iowa 1983).

In a certiorari claim, the court’s judgment is “limited to annulling the writ or sustaining it, in whole or in part, to the extent the proceedings below were illegal or in excess of jurisdiction.” Iowa R. Civ. P. 1.1411. Thus, under the certiorari claim, C. Line’s relief was limited to a remand for further proceedings before a disinterested hearing officer. See *Botsko v. Davenport Civil Rights Comm’n*, 774 N.W.2d 841, 853-54 (Iowa 2009). Further, C. Line sought and obtained a ruling

on its declaratory judgment action prior to the remand ordered in the certiorari claim, rendering the certiorari claim moot. One of the byproducts of that procedural move is that there are no findings on the remand which might demonstrate the violations alleged by C. Line.

The trial court correctly ruled that summary judgment on the due process claim for damages and attorney fees could not be granted based on the record at that time.

VI. Conclusion.

C. Line has a valid and existing adult entertainment license and the status of a nonconforming use. The City of Davenport shall issue C. Line an adult entertainment license, and permit it to open immediately. The summary judgment rulings of the district court are affirmed, and the case is remanded for further proceedings.

AFFIRMED.