COURT OF APPEALS
DECISION
DATED AND FILED

August 2, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2532 **Cir. Ct. No. 2010CV832**

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: DONALD R. ZUIDMULDER, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. John L. Lerch, pro se, appeals an order upholding a raze order issued by the City of Green Bay. Lerch contends the circuit court erred because: (1) the City should have given him a list of the problems with his property and the repairs that needed to be done; (2) WISCONSIN STAT.

§ 66.0413(1)(b)1.,[1] which authorizes the City to issue a raze order, does not apply to a property that is not being used as a dwelling; (3) there was insufficient evidence to establish that the cost of repairing the property would be unreasonable; and (4) the circuit court judge was biased. We reject Lerch's arguments and affirm.

BACKGROUND

¶2 Lerch owns the property located at 313 St. George Street in Green Bay. On February 17, 2010, Green Bay housing inspector Scott Nelson issued an order for Lerch to raze the building on his property, pursuant to WIS. STAT. § 66.0413(1)(b)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." *See* WIS. STAT. § 66.0413(1)(b)1. Repairs are presumed unreasonable if the municipality determines the cost of the repairs would exceed fifty percent of the building's value. *See* WIS. STAT. § 66.0413(1)(c).

¶3 Pursuant to WIS. STAT. § 66.0413(1)(h), Lerch challenged the raze order and sought a restraining order prohibiting the City from razing the building. At a hearing on Lerch's challenge, Nelson testified that, when he initially inspected the exterior of Lerch's property, he observed "numerous violations to

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

the exterior and on the grounds ….” At a later inspection, he noted “several other violations … [including] failure of the roof system, rodent holes from squirrels and other vermin, failing siding, [and] just a general neglect or blight of the exterior of the structure.” Based on these violations, Nelson obtained a warrant to inspect the building’s interior. During the interior inspection, Nelson observed that the building’s lower unit

> was significantly damaged from water damage. There were ceilings caving in. There was damaged flooring and walls. It appeared the plumbing fixtures were not in order. Of course it lacked smoke alarms, [and there was] damage to windows, and doors[. I] observed a cat, a feral cat, inside the unit, and failing walls[.]

Photographs depicting the building’s condition on the day of the inspection were introduced into evidence.

¶4 Nelson further testified that, at the time of the interior inspection, he “felt safe” that the cost of repairing the building would exceed fifty percent of the building’s $11,700 assessed value. He also stated that he had conferred with Kevin King, “who does the estimating and bidding process for various projects … for the planning office.” King estimated the cost of repairing the building would amount to: $5,700 to $6,500 for the roof; $4,500 to $8,000 for the windows; $2,000 for the doors; $3,000 for interior plaster and lathe; $4,000 for plumbing; $4,000 for paint; $3,500 for electrical; and “thousands” for flooring. Thus, according to King’s estimate, the cost of repairing the building would actually exceed its assessed value. Nelson testified that, in his opinion, repairing the building would be unreasonable.

¶5 In contrast, Lerch testified be believed the building could be repaired for “less than $3,000” if he did the work himself. This amount would include

"placing false ceilings in three of the rooms in the downstairs, repairing some walls, and repairing the kitchen floor." Lerch testified that he had already completed some repairs to the building.

¶6 At the close of the hearing, the circuit court concluded that the raze order was reasonable. *See* WIS. STAT. § 66.0413(1)(h). The court determined the building on Lerch's property was "old, dilapidated or out of repair and consequently dangerous, unsafe, unsanitary or otherwise unfit for human habitation." Consequently, the court upheld the raze order.

DISCUSSION

¶7 When Lerch challenged the raze order, the circuit court was required to determine whether the order was reasonable. *See* WIS. STAT. § 66.0413(1)(h). Whether a raze order 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.*** Furthermore, we will not set aside the circuit court's factual findings unless they are clearly erroneous, *see* WIS. STAT. § 805.17(2), and where there is conflicting testimony, the circuit court is the ultimate arbiter of the witnesses' credibility, *see* ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979).

I. List of problems and necessary repairs

¶8 Lerch first argues that, when the City served him with the raze order, it should have given him a list of "what the problems were with [the] building or

what repairs were needed to be done." Lerch asserts that, by failing to provide a list, the City violated his right to due process.

¶9 Lerch's argument is without merit. A city inspector may order a building razed if he or she determines that the building is: (1) "old, dilapidated or out of repair and consequently dangerous, unsafe, unsanitary or otherwise unfit for human habitation[;]" and (2) "unreasonable to repair." WIS. STAT. § 66.0413(1)(b)1. Repairs are presumed unreasonable if the inspector determines the cost of the repairs would exceed fifty percent of the building's value. WIS. STAT. § 66.0413(1)(c). "[I]f the repairs to a building are unreasonable as defined in the statute the building must be razed even though it could be made safe by the expenditure of unreasonable cost of repairs." ***City of Appleton v. Brunschweiler***, 52 Wis. 2d 303, 309, 190 N.W.2d 545 (1971) (interpreting WIS. STAT. § 66.05, which was subsequently renumbered as WIS. STAT. § 66.0413 by 1999 Wis. Act 150, § 134).

¶10 In other words, the option to repair a dilapidated building is only available if the inspector determines the cost of repairs would be less than fifty percent of the building's value. Thus, if the inspector determines the repairs would cost more than fifty percent of the building's value, it follows that there is no reason to provide the property owner with a list of items to repair, because the property owner does not have the option to repair the building. Providing a list of items to repair would only confuse the owner into falsely believing he or she could circumvent the raze order by repairing the property. Thus, the City's failure to provide Lerch with a list of repairs does not make the raze order unreasonable.

¶11 Furthermore, to the extent Lerch is challenging the constitutionality of WIS. STAT. § 66.0413(1)(b)1., our supreme court has held that statute is

constitutional. *See* ***Brunschweiler***, 52 Wis. 2d at 308 (holding there is "no constitutional infirmity" in a statute that authorizes raze orders without the right of repair in cases where the repair would be unreasonable or impractical). Moreover, we conclude that, on the facts of this case, the City's failure to provide Lerch with a list of repairs did not violate his right to due process. Here, the nature and extent of the damage to Lerch's property were so obvious as to make it unnecessary for the City to give him precise notice of the needed repairs.

II. Building not used as a dwelling

¶12 Lerch next argues his property cannot be subject to a raze order under WIS. STAT. § 66.0413(1)(b)1. because he is not currently using the property as a dwelling. Lerch admitted in the circuit court that he has previously rented the building's upper floor as an apartment. He also testified the upper floor "could be rented" in its current condition. However, he contends he currently uses the property as a "storage shed," which need not be fit for human habitation. He essentially argues that § 66.0413(1)(b)1. does not apply to a storage shed.

¶13 However, WIS. STAT. § 66.0413(1)(b)1. authorizes the City to issue a raze 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 and unreasonable to repair[.]" (Emphasis added.) The statute defines the term "building" as "any building or structure or any portion of a building or structure." WIS. STAT. § 66.0413(1)(a)1. The statute does not distinguish between buildings that are used as dwellings and those that are used for other purposes. Instead, the statute provides that "any building" may be subject to a raze order. The City need only determine, as it did in this case, that the building is "old, dilapidated or out of repair and consequently dangerous, unsafe, unsanitary or

otherwise unfit for human habitation and unreasonable to repair[.]" *See* WIS. STAT. § 66.0413(1)(b)1. Thus, that Lerch's property is currently being used as a storage shed, rather than a dwelling, does not make the raze order unreasonable.

¶14 Additionally, even accepting Lerch's argument that WIS. STAT. § 66.0413(1)(b)1. does not apply to a storage shed, we nevertheless reject his argument that the statute does not apply to his property. Although Lerch characterizes the property as a storage shed, the evidence presented at the hearing established that the property was constructed as a dwelling, had been used as a dwelling in the past, and could be used as a dwelling again in the future. While Lerch does not currently use the property as a dwelling, that fact actually provides additional evidence that the building has become unfit for human habitation. Dwellings that have become uninhabitable are frequently uninhabited. Thus, Lerch's argument that a building must be currently inhabited for § 66.0413(1)(b)1. to apply is absurd when the building is one that has traditionally been used as a dwelling.

III. Evidence of the cost of repairs

¶15 Lerch next contends the City did not present sufficient evidence for the circuit court to find that the cost of repairing Lerch's property would exceed fifty percent of its value and would therefore be unreasonable. As previously noted, a circuit court's findings of fact will not be set aside "unless clearly erroneous." WIS. STAT. § 805.17(2). Under the clearly erroneous standard of review, we affirm a finding of fact as long as the evidence would permit a reasonable person to make the same finding, even if the evidence would also permit a contrary finding. *See* ***Reusch v. Roob***, 2000 WI App 76, ¶8, 234 Wis. 2d 270, 610 N.W.2d 168.

¶16 The circuit court heard evidence from both parties about the building's value and the cost of necessary repairs. Lerch and the City agreed the building was worth $11,700. They sharply disagreed, though, about what it would cost to repair the building. Lerch testified he could complete the repairs himself for only $3,000, which would include "placing false ceilings in three of the rooms in the downstairs, repairing some walls, and repairing the kitchen floor." In contrast, Nelson testified more extensive repairs were necessary. Based on his consultation with King, Nelson estimated it would cost at least $26,700 to repair or replace the building's roof, windows, doors, plaster, paint, plumbing, and electrical, plus "thousands" to repair the flooring.[2] Although Lerch contends on appeal that Nelson's testimony was hearsay, he did not raise any hearsay objection in the circuit court. Accordingly, he has forfeited his right to raise a hearsay argument on appeal. *See* WIS. STAT. § 901.03(1)(a).

¶17 When there is conflicting testimony, the circuit court is the sole arbiter of the witnesses' credibility and of the weight to be given to their testimony. *See* ***Plesko v. Figgie Int'l***, 190 Wis. 2d 764, 775, 528 N.W.2d 446 (Ct. App. 1994). Here, the circuit court apparently found Nelson's testimony more credible and persuasive than Lerch's. Nelson's testimony sufficiently supports the court's finding that the cost of repairing the building would exceed its value. Repairing the building was therefore presumptively unreasonable. *See* WIS. STAT. § 66.0413(1)(c).

IV. Judicial bias

[2] Admittedly, the City's repair estimate includes labor costs, while Lerch's estimate does not. However, even if we assume labor costs would amount to seventy-five percent of the City's estimate, the repairs would still exceed fifty percent of the building's value.

¶18 Finally, Lerch appears to contend that the circuit court judge was biased in favor of the City. When we review a claim of judicial bias, "[w]e begin with a presumption that the judge is free of bias and prejudice and the burden is on the party asserting judicial bias to show by a preponderance of the evidence that the judge is biased or prejudiced." ***State v. Neuaone***, 2005 WI App 124, ¶16, 284 Wis. 2d 473, 700 N.W.2d 298. Our analysis involves "both a subjective and an objective test." ***Id.*** We first review "the challenged judge's own determination of whether the judge will be able to act impartially." ***Id.*** Then, we ask whether there are "objective facts demonstrating that the judge was actually biased. This requires that the judge actually treated the defendant unfairly." ***Id.*** (citations omitted).

¶19 Lerch never raised a claim of bias in the circuit court. Consequently, we cannot apply the subjective test because the circuit court never had to determine whether it could proceed impartially. However, in the absence of any objection, we assume that, by presiding, the court believed it could act in an impartial manner. *See* ***State v. Carprue***, 2004 WI 111, ¶62, 274 Wis. 2d 656, 683 N.W.2d 31.

¶20 Applying the objective test, the record does not reveal facts demonstrating actual bias. Lerch asserts that the circuit court "showed a positive attitude toward [the City]" by asking the City to object during Lerch's cross-examination of Nelson. The hearing transcript belies Lerch's assertion. Lerch asked Nelson, "Have you treated me as fairly as you've treated other property owners?" The City's attorney promptly inquired, "Your Honor, what is the scope of this inquiry?" The court responded, "I don't know. I mean there was no objection to any of it. So at this point I don't know." The City's attorney then objected based on relevance, but the court overruled the objection, reasoning that

Lerch's question went to Nelson's credibility. We fail to see how this exchange shows that the court was biased in favor of the City.

¶21 Lerch further asserts that the circuit court judge would not allow Lerch "to submit evidence as to how the [i]nspection [w]arrant was obtained." However, the judge determined evidence related to the inspection warrant was not relevant to the ultimate issue of whether the raze order was reasonable. A circuit court has great discretion in determining whether to admit or exclude evidence. ***State v. Evans***, 187 Wis. 2d 66, 77, 522 N.W.2d 554 (Ct. App. 1994). Lerch has not presented a developed argument that the circuit court erroneously exercised its discretion by excluding the inspection warrant evidence, let alone that the exclusion demonstrates judicial bias. An adverse ruling, by itself, is generally insufficient to establish bias. *See* ***Liteky v. United States***, 510 U.S. 540, 555 (1994).

¶22 Lerch also complains that the circuit court judge questioned him, but did not question Nelson. Yet, the mere fact that a judge asks questions of a witness does not indicate anything about the judge's motives. Furthermore, while Lerch contends the judge "showed a prejudicial attitude" at certain pages in the hearing transcript, he does not identify any specific instances of bias on those pages. Our independent review of the transcript does not reveal any evidence of bias. Finally, Lerch notes that the judge "would not inform Lerch of his appeal rights" at the close of the hearing. Lerch does not cite any legal authority for the proposition that a circuit court judge is required to advise unsuccessful litigants of their appeal rights. The judge's failure to do so in this case is not evidence of actual bias. On the whole, Lerch has failed to overcome the presumption that the circuit court judge was free of bias and prejudice. *See* ***Neuaone***, 284 Wis. 2d 473, ¶16.

By the Court.—Order affirmed.

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