

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CITY OF LAKEWOOD)	CASE NO. CV 05 569672
)	
Plaintiff)	
)	
-vs-)	<u>JUDGMENT ENTRY</u>
)	
CALANNI ENTERPRISES, INC.)	
)	
Defendant)	

John P. O'Donnell, J.:

Plaintiff, the City of Lakewood, has sued defendant Calanni Enterprises, Inc. alleging that its car repair business, Calanni's Auto Service, is operated so as to constitute a common law public nuisance. The complaint was tried to the court on November 29 and 30, 2007.

I. LAW

Lakewood has asserted a common law cause of action for public nuisance against Calanni. A common, or public, nuisance is the doing of or the failure to do something that injuriously affects the safety, health or morals of the public, or works some substantial annoyance, inconvenience or injury to the public. *Commonwealth v. South Covington & Cincinnati Street Railway Co.*, (1918), 181 Ky. 459, 463. To be considered public, the nuisance must affect an interest common to the general public and it is not necessary that the entire community be affected, so long as the nuisance will interfere with those who come in contact with it in the exercise of a public right. *W. Keaton, D. Dobbs, R. Keaton & D. Owen, Prosser & Keaton on the Law of Torts*, 645 (5th Ed. 1984).

To constitute a nuisance, either public or private, the acts complained of must either cause injury to or obstruct the reasonable use or enjoyment of another's property. *Crown Property Dev., Inc. v. Omega Oil Co.* (1996), 113 Ohio App.3d 647, 658. Public nuisance is defined as an unreasonable interference with a right common to the general public. *Brown v. Scioto Cty. Bd. Of Commrs.* (1993), 87 Ohio App.3d 704, 712. Public nuisance affects the public at large or such of them as may come in contact with it by injuriously affecting the safety or health of the public, or by working some substantial annoyance, inconvenience, or injury to the public. *Crown Property, supra*, at 658.

Because Lakewood seeks permanent injunctive relief, its burden is to prove by clear and convincing evidence that a nuisance exists, that the city does not have an adequate remedy at law, and that a permanent injunction is necessary to prevent irreparable harm. *See, e.g., P & G v. Stoneham* (2000), 140 Ohio App.3d 260, at 267.

II. FACTS

Calanni has operated at 13728 Madison Avenue in Lakewood since the early 1980s. The enterprise began as a gasoline station that also offered car repair. The gasoline pumps were removed around 1984 and automobile repair became the sole business.

The evidence at trial showed that Calanni's has been a constant source of irritation for its neighbors. The offending conduct includes: working on cars in the street; storing unlicensed vehicles on both the primary and secondary locations;¹ monopolizing nearby parking meters; and constantly moving and rearranging all of the cars that are packed tightly onto the primary business premises.

Lieutenant Roger Warner of the Lakewood Police Department testified that he is aware of "constant problems" with the defendant's "parking issues." The police department receives

¹ The primary location is 13728 Madison; the secondary location is a lot on Madison behind a storefront directly opposite the repair shop.

many complaints from nearby businesses whose customers are driven away because of the lack of available parking caused by Calanni's taking all of the close metered spots. The competent evidence at trial on the subject of parking did not include the testimony of any resident or business operator who has experienced "substantial annoyance, inconvenience, or injury." Nor did the city present evidence that the defendant was ever cited for a specific statutory violation associated with the selfish use of meters.

Michael J. Flynn is an investigator for Lakewood's law department who handles cases referred there by the city's building department. Before starting his current job in 1989 he was a detective for the police department. He testified that the defendant has been cited many times for having unlicensed or immobile vehicles on both the primary and secondary locations.²

The defendant has also been prosecuted for violating the city's building code by working on cars outside of the building.³ Flynn's testimony established that similar car repair shops in the city are rarely cited for the same behavior.

Charles E. Barrett was Lakewood's building commissioner from 1999 until 2007. He testified that the city has from three to six commercial inspectors working at any time and, because resources are thin, these inspectors do not usually go to a business without having first received a complaint. Calanni's has been the source of many complaints and therefore the object of many inspections. Barrett is aware of many occasions where Calanni's employees were working on cars outside the building. On one occasion, owner Charles Calanni told Barrett that "the building commissioner" had given him permission to work on cars outside the building. That claim was false. Barrett further testified that he cannot recall other car repair shops in the city being cited for working on cars outside the building.

² Lakewood Codified Ordinances §1143.09.

³ Lakewood Codified Ordinances §1161.03(j)(3)

This particular conduct is of concern to the neighbors and the city because of its “blighting effect,” according to Barrett.

John M. Lunter is Lakewood’s environmental health coordinator. He has held this position since 1985. One of his responsibilities is to handle litter and trash-related complaints. Lunter has seen at Calanni’s repeated instances of improper tire storage. This code violation is a concern because it can foster the breeding of vermin. Lunter met with Charles Calanni many times to point out the statutory breach, but the violations continued. He testified that Calanni has demonstrated a “pattern of non-compliance.”

Lakewood’s acting building commissioner is Edward Fitzgerald. He has worked for the building department since 1979. He testified that buildings in the city are inspected either upon application for a building permit or based upon a complaint. He observed that Calanni’s is a “very frequent” subject of complaint inspections. His testimony included the observation that unlicensed parked cars and the servicing of the cars outside the garage are a “constant fact.”

Fitzgerald also noted that a local ordinance requires that cars parked at the business need to be able to be moved independently of each other.⁴ Cars at Calanni’s primary lot are parked close behind and next to each other, necessitating their constant moving and repositioning. According to Fitzgerald the situation amounts to “chaos.”

Fitzgerald testified that Calanni has been cited for so many violations that the city no longer sends a notice of correction before issuing a summons, a courtesy it normally extends to non-repeat offenders.

Fitzgerald observed that “every time we get a call it’s a legitimate complaint.”

⁴ Lakewood Codified Ordinances §1325.08.

III. CONCLUSION

A. Calanni's is a nuisance

The defendant is the constant source of a variety of neighbor complaints. Repairing cars outside the building is noisy and jarring. The primary lot crammed with cars and the secondary lot full of broken-down vehicles are eyesores. The constant moving, parking and re-parking of cars is at least annoying to neighbors and other affected drivers and at worst a safety hazard. The defendant has often violated municipal ordinances intended to protect the public health, safety and quality of life, and has continued to break those same laws.

As mentioned, the evidence at trial did not include the testimony of any witness who had personally suffered “substantial annoyance, inconvenience, or injury” because of the defendant’s actions in general. There was, however, substantial and competent evidence of repeated statutorily prohibited conduct. That evidence included credible testimony that every time the city responded to a citizen complaint a violation was discovered. By acceptable inference, then, substantial annoyance and inconvenience is obvious and the evidence was therefore clear and convincing that some of the defendant’s practices in carrying on its business constitute a nuisance. However, because the evidence was clear and convincing as to statutory violations only, it is only those practices that are subject to injunction as a nuisance.

B. The requested relief

Lakewood has specifically requested, at pages 15 and 16 of its complaint, the following relief:

1. Declaratory judgment that, by virtue of the repeated and notorious violations of the building use, parking, and zoning regulations of the Codified Ordinances of the City of Lakewood, and the bad faith of the Owner and the Business in regard those regulations, the Owner and the Business have forfeited and surrendered the “similar use variance” granted to the Business in 1984, and that the Business must comply with the current applicable zoning regulations of §1161.01 et seq.;

2. Preliminary and permanent injunctive relief that: limits the number of motor vehicles that may be on the business premises, outside the principal structure, to four (4) or less; prohibits the use of parking metered spaces, with the two-hour limit on Madison Avenue, in excess of six (6) such meters; and prohibits any parking in front of residences on Parkwood or Wyandotte Avenues by the Owner, the Business, or their employees;
3. Preliminary and permanent injunctive relief that prohibits the Owner and the Business from using, as accessory parking for the Business, the parking lot behind the commercial buildings across the street from the Business that are in the Owner and the Business's custody and control, directly or indirectly, and that prohibits any other accessory parking or storage of vehicles owned, controlled, stored, or being serviced by the Owner or the Business, except inside appropriate structures for such parking or storage.

C. There is an adequate remedy at law

In fashioning a remedy, if any, the court is constrained in this case by the narrow evidence at trial – *i.e.*, only conduct violative of existing statutes was proven - and the limited remedy requested by the city. Lakewood has not asked that the business be closed. The court will not grant a remedy that hasn't been requested, therefore an injunction ordering that the defendant cease operations entirely is not a possible remedy here. Instead, Lakewood has essentially asked that the defendant be enjoined from breaking its existing zoning and building codes and be subject to a citation for contempt of court in the event the conduct is repeated in the future. Any injunction must be fashioned with these considerations, and the requirement that Lakewood not have an adequate remedy at law, in mind.

Lakewood's first request – that the defendant be declared to be subject to section 1161.03(j)(3) of the Lakewood Codified Ordinances – is moot as having already been accomplished. In *City of Lakewood v. Charles Calanni* (June 8, 2006), 2006-Ohio-2883, at ¶17, the Cuyahoga County Court of Appeals held that Calanni's "is subject to section 1161.03(j)(3)." Therefore, in accordance with that section, the defendant is required to conduct all car repair activities, including cleaning, washing and drying, inside the principal structure. Failure to do so

subjects the defendant to enforcement and penalty pursuant to sections 1175.01 and 1175.02 of the same code.

The plaintiff's second proposed remedy has several components. The city wants the defendant limited to parking no more than four cars on its primary premises at any given time. Presumably this would reduce both the visual blight of a lot overstuffed with cars and the hazards associated with incessant repositioning of cars. But the proof at trial was only clear and convincing to the extent that the court finds that the defendant has often violated the statutory prohibition against cars being parked without unobstructed access to the street. Although there were pictures admitted into evidence as defendant's exhibit H that show the defendant's garage has five service bays, there was no evidence at trial of the number of the defendant's employees or of the gross floor area of the defendant's building. It is therefore impossible for the court to calculate the number of parking spaces required for the defendant pursuant to schedule 1143.05 of the Lakewood Codified Ordinances. Moreover, the city did not prove the alleged parking and meter use habits of the defendant that are not statutory violations and the court cannot enjoin conduct that was not proved at trial. Hence, other than affirming that the defendant, as the operator of a nuisance, is subject to the parking restrictions in section 1325.08(a) of the Lakewood Codified Ordinances,⁵ the court declines to enjoin conduct already prohibited by statute because there is an adequate remedy at law.

The city finally seeks restrictions on the use of the parking lot at the defendant's secondary location behind a storefront building on the south side of Madison Avenue. Section 1143.02(d) of Lakewood's Codified Ordinances requires that all parking "shall be provided on the same lot as the principal use to which it is accessory." As concluded above, the defendant's use of the secondary lot to store unlicensed and immobile vehicles is a nuisance, thus depriving

⁵ Since the defendant's parking practices constitute a nuisance he is not entitled to the "grandfather" protection of §1149.01 of Lakewood's Codified Ordinances.

him of any “grandfather” protection he might have otherwise had from the enforcement of section 1143.02(d) and he is subject to the penalties set forth in sections 1175.01 and 1175.02 for a violation of that or any other parking law in connection with the secondary lot. As with the other nuisance conduct proven at trial, the city therefore has an adequate statutory remedy at law and does not need an injunction from this court. The same reasoning applies to the storage of unlicensed or immobile vehicles on either lot. Hence, the court declines to enter a specific order governing the defendant’s use of the secondary lot.

A mandatory injunction will be refused where such a decree would require a difficult and expensive act or where its enforcement would necessitate close and continuous supervision by the court for an indefinite period. *Miller v. W. Carrollton* (1993), 91 Ohio App.3d 291, at 297. The relief sought by the city in this case falls into this category. Because the city proved by clear and convincing evidence only acts that are violations of existing laws, any injunction by this court short of closing the defendant would be redundant to the municipal ordinances that Lakewood is obviously already enforcing. Additionally, where the defendant has not been deterred from being a nuisance by the time, effort and expense associated with citations for statutory violations, the court doubts that a second layer of similar sanctions will have any additional deterrent effect without the possibility that the defendant’s business will be ordered to shut down. For those reasons, the city’s requests for injunctive relief are denied.

IT IS SO ORDERED.

Date: April 4, 2008

JOHN P. O’DONNELL, JUDGE

CERTIFICATE OF SERVICE

A copy of the foregoing Judgment Entry was sent by regular U.S. Mail this 4th day of April, 2008, to the following:

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