Atty Faniglietti
Case law 3/2/2001





137 Conn.App. 61
Appellate Court of Connecticut.

Forrest E. CRISMAN, Jr.
v.
ZONING BOARD OF APPEALS OF the TOWN OF MORRIS.

Nos. 33393, 33394.
|
Argued April 24, 2012.
|
Decided July 24, 2012.

**Synopsis**

**Background:** Town zoning enforcement officer issued a cease and desist order to property owner, who was in the process of constructing a new, larger garage on his property pursuant to a zoning permit he had obtained. Owner appealed to zoning board of appeals, which upheld the order. Owner appealed. Abutting landowner was granted permission to intervene as a party defendant. The Superior Court, Judicial District of Litchfield, Danaher, J., ruled that town was estopped from enforcing the order. Town, board, and abutting landowner filed separate appeals.

**[Holding:]** The Appellate Court, Alvord, J., held that trial court's findings in support of its conclusion that doctrine of municipal estoppel applied to bar town from enforcing cease and desist order were not clearly erroneous.

Affirmed.

West Headnotes (12)

**[1] Estoppel** Essential elements

There are two essential elements to an estoppel: the party must do or say something that is intended or calculated to induce another to believe in the existence of certain facts and to act upon that belief, and the other party, influenced thereby, must actually change his position or do some act to his injury which he otherwise would not have done.

2 Cases that cite this headnote

**[2] Estoppel** Municipal corporations in general

For a court to invoke municipal estoppel, the aggrieved party must establish that: (1) an authorized agent of the municipality had done or said something calculated or intended to induce the party to believe that certain facts existed and to act on that belief, (2) the party had exercised due diligence to ascertain the truth and not only lacked knowledge of the true state of things, but also had no convenient means of acquiring that knowledge, (3) the party had changed its position in reliance on those facts, and (4) the party would be subjected to a substantial loss if the municipality were permitted to negate the acts of its agents.

2 Cases that cite this headnote

**[3] Estoppel** Municipal corporations in general

Because municipal estoppel should be invoked only with great caution, there is a substantial burden of proof on the party who seeks to do so.

2 Cases that cite this headnote

**[4] Estoppel** Questions for jury

The question of whether a plaintiff has met his burden to establish the elements of estoppel is a question of fact.

  

[5] **Appeal and Error**🔑Estoppel and waiver

Whether a party seeking to invoke municipal estoppel has met his burden of proof is a question of fact that will not be overturned unless it is clearly erroneous.

1 Cases that cite this headnote

[6] **Appeal and Error**🔑What constitutes clear error

A court's determination is clearly erroneous only in cases in which the record contains no evidence to support it, or in cases in which there is evidence, but the reviewing court is left with the definite and firm conviction that a mistake has been made.

[7] **Zoning and Planning**🔑Estoppel or inducement

Because municipal estoppel is an equitable claim, it is for the trial court and not the town zoning board of appeals to determine whether the conduct of municipal officials justifies the invocation of the doctrine.

[8] **Zoning and Planning**🔑Estoppel or inducement

Trial court's findings in support of its conclusion that doctrine of municipal estoppel applied to bar town from enforcing cease and desist order issued by zoning enforcement officer against property owner who had obtained zoning permit to build a new garage on his property were not clearly erroneous; officer, as town's authorized agent, made statements and took actions calculated to induce owner to believe that he was proceeding in compliance with zoning regulations and to induce him to act on that belief, owner proved that his proposed structure was not a permissible accessory building and that he had no convenient means of acquiring that knowledge, and owner would suffer a substantial loss if town were able to negate acts of officer.

[9] **Evidence**🔑Credibility of witnesses in general

The trial court is free to accept or reject, in whole or in part, the evidence presented by any witness, having the opportunity to observe the witnesses and gauge their credibility.

[10] **Appeal and Error**🔑Credibility and Number of Witnesses
**Appeal and Error**🔑Province of, and deference to, lower court in general

Appellate court defers to the trial court's discretion in matters of determining credibility and the weight to be given to a witness's testimony.

[11] **Appeal and Error**🔑Retrial on review in general
**Appeal and Error**🔑Credibility and Number of Witnesses

An appellate court cannot retry a matter, nor can it pass on the credibility of a witness.

[12] **Zoning and Planning**🔑Estoppel or inducement
**Zoning and Planning**🔑Determination, orders,

  

and findings in general

Appropriate remedy with respect to application of doctrine of municipal estoppel to bar town from enforcing cease and desist order issued by zoning enforcement officer against property owner who had obtained zoning permit to build a new garage on his property was to allow owner to complete construction of garage, not a remand to zoning board of appeals for a more definitive statement as to how much of the presently constructed garage could remain, and it would be highly inequitable and oppressive to allow town to enforce its zoning regulations, as it had chosen to interpret them.

**Attorneys and Law Firms**

**1007 Franklin G. Pilicy, Watertown, for the appellant in AC 33393 (intervening defendant).

Peter C. Herbst, Torrington, with whom was James P. Steck, for the appellee/cross appellant in AC 33393 and the appellee in AC 33394 (plaintiff).

Steven E. Byrne, for the appellant in AC 33394 (named defendant).

LAVINE, ROBINSON and ALVORD, Js.

**Opinion**

ALVORD, J.

*62 The defendant zoning board of appeals of the town of Morris (board) and the intervening defendant, David M. Geremia, filed separate appeals from the judgment of the trial court sustaining the administrative appeal of the plaintiff, Forrest E. Crisman, Jr., from the board's decision upholding a cease and desist order issued by the town's zoning enforcement officer. On appeal, Geremia claims that the court improperly concluded that the plaintiff proved his municipal estoppel *63 claim. Similarly, the board claims that the court improperly determined that the doctrine of municipal estoppel was applicable under the circumstances of this case and additionally claims that the court improperly concluded that the plaintiff could complete construction of the structure that was the subject of the cease and desist order.[1] We affirm the judgment of the trial court.

The record reveals the following facts and procedural history. The plaintiff owns property on the east shore of Bantam Lake in Morris located in the lake residential district. The primary dwelling on the property is less than 800 square feet in size. Prior to December, 2007, a one car garage erected circa 1900 also was located on the plaintiff's property. The garage was partially situated within an area that became the right-of-way for a town road. At that point in time, the garage became a preexisting, legal nonconforming structure. In December, 2007, a tree fell on the garage and caused substantial damage.

Later in December, 2007, shortly after the tree damaged the garage, the plaintiff met with the town's zoning enforcement officer, Leon Bouteiller. The plaintiff wanted to obtain the requisite permits and approvals for the replacement and enlargement of the garage. The plaintiff met with Bouteiller repeatedly to discuss the *64 project. Bouteiller, after eliciting information **1008 from the plaintiff, filled out the application for the zoning permit to allow construction of the new structure. The plaintiff and Bouteiller signed the application. Bouteiller issued the zoning permit on April 23, 2008, which approved the construction requested by the plaintiff.[2] The plaintiff provided the town's building inspector with architectural plans of the proposed structure in May, 2008, and began construction.

On July 15, 2008, Bouteiller, at the direction of the town's planning and zoning commission (commission), issued a cease and desist order to the plaintiff advising him that a two foot kneewall was being built that had not been shown on the approved site plan. On July 24, 2008, Bouteiller released the first cease and desist order and replaced it, again at the direction of the commission, with a second cease and desist order dated July 24, 2008. The second cease and desist order, which is the operative order for purposes of this appeal, ordered the plaintiff to stop construction for the following reason: "The April 23, 2008 Zoning Permit authorizes a 1450 square foot ground level single story garage addition. No Zoning Permit has been issued for any construction beyond 1450 square feet. All construction beyond the 1450 square feet and any other use other than a garage is in violation of the April 23, 2008 Zoning Permit." The plaintiff already had expended approximately $100,000 on the project by the time the cease and desist orders were issued.

On August 22, 2008, the plaintiff appealed to the board from the July 24, 2008 cease and desist order. See

  

General Statutes § 8–7. The plaintiff and Bouteiller *65 addressed the board at its hearing held on the plaintiff's appeal. On November 25, 2008, the board voted to uphold the cease and desist order. The deliberation portion of that meeting was not recorded, however, and the minutes gave a cursory summary of the reasons for the board's decision. Notice of that decision was published on November 27, 2008, and the plaintiff filed a timely appeal with the Superior Court. See General Statutes § 8–8(b). At the board's January 6, 2009 meeting, which was held after the filing of the plaintiff's appeal to the Superior Court, the board "corrected" the minutes of the November 25, 2008 meeting and identified the bases for the members' votes. From the members' comments in the "corrected" minutes, the consensus was that the cease and desist order had been properly issued because the plaintiff's proposed structure was not subordinate to the primary dwelling on the property and, therefore, was not a permissible accessory building.

This administrative appeal had been pending before the Superior Court for more than six months when Geremia, an abutting landowner, filed a motion to intervene as a party defendant. The court granted his motion, and the parties filed prehearing briefs setting forth their respective positions. On August 24, 2010, the court held a hearing. The plaintiff presented evidence as to his aggrievement, and, in furtherance of his equitable municipal estoppel claim, he presented evidence as to the expenses he had incurred in connection with the construction of his unfinished structure.[3] During the *66 course **1009 of the hearing, the parties agreed that it would be appropriate for the court to conduct a site visit. The court granted their request, stating that it would notify the parties after the visit was completed and that it would permit the filing of supplemental briefs. The court further indicated that it would schedule a second hearing date if it had questions or if it required additional oral argument.[4]

On January 11, 2011, the court issued its memorandum of decision. After finding that the plaintiff was statutorily aggrieved by the board's decision, the court summarized the parties' positions and addressed each claim. The court first determined that the board's decision to uphold the cease and desist order was based on grounds other than those specified in that order. Although the issue of whether the proposed structure should be characterized as an accessory building or the primary building was not raised in the cease and desist order, the matter had been discussed at the hearing before the board. The court noted that the plaintiff had not claimed unfair surprise or inadequate opportunity to respond to that issue when he appeared before the board. Accordingly, the court concluded that "the plaintiff was not prejudiced by the fact that the board's decision to uphold the cease and desist order was not strictly based on the points set forth in the [cease and desist] order." The court further found that there was sufficient evidence in the record to support the board's conclusion that the proposed building was not a permissible accessory building.

The court then addressed the plaintiff's municipal estoppel claim. After citing relevant case law, the court found that the plaintiff had satisfied all of the requirements necessary to invoke that doctrine. The court *67 began its analysis by stating that the parties agreed that Bouteiller was the authorized agent of the municipality. The court then made the following factual findings. Bouteiller met with the plaintiff several times and was made aware of the projected size and uses to be made of the building, even though he did not see the architectural plans at the time he issued the zoning permit. Bouteiller did not see the architectural plans before issuing the zoning permit because they were prepared later for purposes of obtaining the building permit. Moreover, as explained by Bouteiller, the zoning regulations did not require that architectural plans be submitted for the issuance of a zoning permit for an accessory building. Furthermore, Bouteiller stated that even if the architectural plans had been made available to him, he would have concluded that the project was in full compliance with the zoning permit.

The court then made the following determinations: "Based on his many discussions with [Bouteiller], and after the zoning permit was issued, the plaintiff began construction on his proposed building. He obtained architectural drawings, incurred engineering expenses, took the steps necessary to install a new septic system, ordered building materials, and in summary expended more than $100,000 on the project prior to the issuance of the cease and desist orders.... For all of the foregoing reasons, the court finds that the board should be and is estopped from enforcing the cease and desist order." The defendants **1010 and the plaintiff filed the present appeals after this court granted their petitions for certification.

The dispositive issue in these appeals is whether the trial court correctly determined that the plaintiff proved his municipal estoppel claim, thereby precluding the enforcement of the cease and desist order that prohibited the construction of the plaintiff's proposed structure. The board argues that the court's factual findings *68 were clearly erroneous because the plaintiff induced Bouteiller to act on a misleading and incomplete application, and he failed to prove that he would suffer substantial harm if the cease and desist order was enforced. The board further

  

claims that the court applied an inappropriate remedy and should have remanded the matter back to the board "for a more definitive statement ... as to how much of the presently constructed garage addition could remain." Geremia, the abutting landowner, argues that the court's findings are clearly erroneous because there is compelling evidence in the record disputing what representations were made to the plaintiff by Bouteiller. He further claims that Bouteiller's statements at the zoning board hearing were not credible and that the plaintiff did not exercise due diligence in proceeding with the project. Finally, he argues that the plaintiff failed to demonstrate a substantial loss.

[1] [2] We first set forth the appropriate principles guiding our review. Our Supreme Court has acknowledged that there are situations where the doctrine of estoppel may be applicable to municipalities in the enforcement of zoning laws. See *Bloom v. Zoning Board of Appeals,* 233 Conn. 198, 204, 658 A.2d 559 (1995); *Dupuis v. Submarine Base Credit Union, Inc.,* 170 Conn. 344, 354, 365 A.2d 1093 (1976). "There are two essential elements to an estoppel—the party must do or say something that is intended or calculated to induce another to believe in the existence of certain facts and to act upon that belief; and the other party, influenced thereby, must actually change his position or do some act to his injury which he otherwise would not have done.... [I]n order for a court to invoke municipal estoppel, the aggrieved party must establish that: *(1) an authorized agent of the municipality had done or said something calculated or intended to induce the party to believe that certain facts existed and to act* ***69** *on that belief; (2) the party had exercised due diligence to ascertain the truth and not only lacked knowledge of the true state of things, but also had no convenient means of acquiring that knowledge; (3) the party had changed its position in reliance on those facts; and (4) the party would be subjected to a substantial loss if the municipality were permitted to negate the acts of its agents.*" (Citation omitted; emphasis added; internal quotation marks omitted.) *O'Connor v. Waterbury,* 286 Conn. 732, 757–58, 945 A.2d 936 (2008).

[3] [4] [5] [6] [7] "[B]ecause municipal estoppel should be invoked only with great caution, our case law clearly imposes a substantial burden of proof on the party who seeks to do so." *Cortese v. Planning & Zoning Board of Appeals,* 274 Conn. 411, 418–19, 876 A.2d 540 (2005). The question of whether a plaintiff has met his burden to establish the elements of estoppel is a question of fact. See *Russo v. Waterbury,* 304 Conn. 710, 737, 41 A.3d 1033 (2012). "[A] claim of municipal estoppel is ... inherently fact bound.... The party claiming estoppel ... has the burden of proof.... Whether that burden has been met is a question of fact that will not be overturned unless it is clearly erroneous.... A court's determination is clearly erroneous only in cases in which the record contains no evidence to support it, or in cases in which there is evidence, but the ****1011** reviewing court is left with the definite and firm conviction that a mistake has been made." (Citation omitted; internal quotation marks omitted.) *Conservation Commission v. Red 11, LLC,* 119 Conn.App. 377, 387, 987 A.2d 398, cert. denied, 295 Conn. 924, 991 A.2d 566 (2010).[5]

***70** In the present case, with respect to the first factor required to establish municipal estoppel, the court found that Bouteiller, as the town's zoning enforcement officer, was the authorized agent of the municipality who was responsible for issuing zoning permits.[6] Neither the board nor Geremia disputed that fact. The court further found that Bouteiller was aware that the plaintiff intended that the proposed structure would be more than one level and that it would have a roof and a deck. Bouteiller also knew that the total square footage of the building would be more than the amount entered on the permit.[7] The court further found that Bouteiller knew the uses that were planned for that building, which included a storage space, bathroom and a personal office or study. Although Bouteiller did not have the architectural plans when he issued the zoning permit, the court credited Bouteiller's clear statement that the project was in full compliance with the zoning regulations after he had the opportunity to review those plans at a later date. Significantly, Bouteiller unequivocally stated that he had not agreed with the commission's reasoning underlying the issuance of either of the two cease and desist orders served on the plaintiff. For those reasons, the court found: "[T]he [zoning enforcement officer], an agent of the town, took many actions and made many statements calculated to induce the plaintiff to believe that he was proceeding in compliance with the zoning regulations and to act on that belief."

The board and Geremia do not dispute that there is support in the record for the court's factual findings. ***71** Instead, they claim that there is conflicting evidence and that Bouteiller's statements were not credible. They maintain that Bouteiller was misled by the plaintiff's claim that he did not intend to use the proposed structure as the primary structure on his property. According to the defendants, the plaintiff's representation is belied by the fact that the size and layout of the building would lend itself to uses in violation of the zoning regulations. The court acknowledged these arguments, but it concluded that there was nothing in the record that indicated that the plaintiff had not been truthful with Bouteiller or the board. The plaintiff consistently had maintained that all of

his proposed uses of the building were permissible uses under the town's zoning regulations.[8] Moreover, as noted by the court, if the plaintiff did proceed to use the structure in a way that was not permitted by the regulations, the town **1012 would have appropriate remedies available to it. See General Statutes § 8–12.

[8] [9] [10] [11] On the basis of this record, we cannot conclude that it was clearly erroneous for the court to find that the plaintiff met his burden of proof in establishing that Bouteiller, as an authorized agent of the town, made statements and took actions calculated to induce the plaintiff to believe that he was proceeding in compliance with the zoning regulations and to induce him to act on that belief. We will not second guess the considered judgment of the trial court. It is axiomatic that "[t]he trial court is free to accept or reject, in whole or in part, the evidence presented by any witness, having the opportunity to observe the witnesses and gauge their credibility.... This court defers to the trial court's discretion in matters of determining credibility and the weight to be given to a witness' testimony.... We cannot retry the matter, nor can we pass on the *72 credibility of a witness." (Internal quotation marks omitted.) *Rozsa v. Rozsa,* 117 Conn.App. 1, 10, 977 A.2d 722 (2009).[9]

With respect to the second factor required to establish municipal estoppel, the defendants challenge the court's determination that the plaintiff proved that he had exercised due diligence to ascertain the truth, that he did not know that his proposed structure was not a permissible accessory building and that he had no convenient means of acquiring that knowledge. Specifically, Geremia argues that the plaintiff did not exercise due diligence because he failed to disclose the total proposed floor area, he failed to contact Bouteiller for a site inspection when the foundation was completed, he failed to present the architectural plans to Bouteiller, and he failed to ask Bouteiller or any other municipal official whether his plans conflicted with the town's regulations on accessory structures. The board argues that the "plaintiff did not exercise due diligence to ascertain the truth but instead, actively misinformed various municipal officials in order to obtain the permits he needed to accomplish his grand scheme of constructing a resplendent residence on Bantam Lake instead of the modest garage addition [that] the zoning permit would allow."[10]

The court's determination that the plaintiff exercised due diligence is based on its findings, which are amply supported by the record, that: Bouteiller believed that the building and its intended uses were permissible under the regulations; Bouteiller worked closely with *73 the plaintiff in applying for and issuing the zoning permit; and the court's site visit revealed that the size of the proposed structure in itself was not a clear indication that it would not be considered an accessory building. Furthermore, the record reveals that Bouteiller's position at the time the zoning permit was issued, at the time the commission directed him to issue the cease and desist orders and at the time of the hearing before the board has been consistent. He stated that he knew of the plaintiff's intended plans and concluded that the proposed size and uses of the structure complied with the regulations. He also stated that even if he had seen the architectural plans before issuing the zoning permit, his conclusion as to compliance would remain the same. Accordingly, we conclude that the court's finding that "[t]here is no way that the plaintiff could have reasonably done any more than he did to learn what would be permissible uses for, and in, his **1013 proposed accessory building" was not clearly erroneous.

The defendants' next claim, directed to the fourth factor[11] required for establishing municipal estoppel, is that the court improperly found that the plaintiff would suffer a substantial loss if the municipality were able to negate the acts of Bouteiller, its agent, in issuing the zoning permit. The board and Geremia argue that the plaintiff's expenditures will not be forfeited entirely if the cease and desist order is upheld. They claim that the costs for engineering, architectural plans, the septic system and building materials would be necessary if the plaintiff proceeds with the construction of a permissible one-story garage.

*74 In its memorandum of decision, the court found that the plaintiff expended more than $100,000 on the project prior to the issuance of the cease and desist orders. The court made the following determination: "The plaintiff changed his position in reliance on the issuance of the zoning permit and the assurances of the zoning enforcement officer. The court finds that he did so in good faith. If the municipality were to be able to negate the acts of its agent, under all of the circumstances of this case, the plaintiff would be subjected, wrongfully, to a very significant loss. Under these circumstances, for the town to enforce its zoning regulations, as it has chosen to interpret them in this case, would be highly inequitable and oppressive."

The court, in reaching its finding, considered the evidence at the board hearing, at which the plaintiff and Bouteiller spoke, and the plaintiff's testimony at the court hearing on August 24, 2010. Additionally, the plaintiff submitted seventy-six exhibits at the court hearing, including delivery slips, a summary of costs, a summary of

  

payments, copies of checks and copies of bank statements, all of which related to the construction project. The plaintiff testified that his expenditures totaled $139,089.18, but that he did not have all of the receipts to substantiate that figure. He also testified that a portion of some of the expenses could be allocated to the cottage on his property, such as the septic system and the well because they were designed to service both the garage and the cottage.

The following legal principles are relevant to the defendants' claim. "[I]n examining municipal estoppel claims, this court has often turned to the definition and discussion of the concept of substantial loss developed by courts in Illinois.... In reviewing the Illinois case law concerning substantial loss, it is evident that the primary consideration in determining whether a party will suffer a substantial loss is whether a party has made significant expenditures in reliance upon the representation ***75** of a municipal official. See, e.g., *Drury Displays, Inc. v. Brown,* 306 Ill.App.3d 1160, 1165–67, 240 Ill.Dec. 173, 715 N.E.2d 1230 (concluding that trial court did not abuse its discretion in granting writ of mandamus to compel city to reinstate permit where plaintiff expended $49,897.20 in reliance on issuance of permits), appeal denied, 186 Ill.2d 567, 243 Ill.Dec. 561, 723 N.E.2d 1162 (1999); *Hagee v. Evanston,* 91 Ill.App.3d 729, 734, 47 Ill.Dec. 68, 414 N.E.2d 1184 (1980) (finding municipal estoppel where, inter alia, 'large sums of money were expended in reliance upon the permit and apparent acquiescence ****1014** by city officials'); *Peru v. Querciagrossa,* 73 Ill.App.3d 1040, 1042, 30 Ill.Dec. 123, 392 N.E.2d 778 (1979) (concluding municipal estoppel established where plaintiff made 'substantial expenditures' in reliance on instructions provided by city zoning inspector); *Emerald Home Builders, Inc. v. Kolton,* 11 Ill.App.3d 888, 893, 298 N.E.2d 275 (1973) (affirming trial court's determination that municipal estoppel established because plaintiff had spent $15,560.97 in reliance on issuance of building permit)." (Citation omitted.) *Levine v. Sterling,* 300 Conn. 521, 539–40, 16 A.3d 664 (2011).

Here, the court, taking into account some shared expenses for the garage and cottage and the fact that the plaintiff did not have receipts for all of his claimed expenditures, nevertheless found that he "expended more than $100,000 on the project prior to the issuance of the cease and desist orders." We cannot conclude that this finding, in light of the evidence presented before the board and the court, was clearly erroneous. Given these substantial expenditures, it was not improper for the court to make the determination that the plaintiff would suffer a significant loss if the cease and desist order was enforced.[12]

[12] ***76** The board's final claim is that the court improperly concluded that the plaintiff could complete construction of the structure. The board argues that the court should have remanded the matter to the board "for a more definitive statement ... as to how much of the presently constructed garage addition could remain."

As correctly noted by the board in its appellate brief, "[t]he relief granted must be compatible with the equities of the case." *Dupuis v. Submarine Base Credit Union, Inc.,* supra, 170 Conn. at 356, 365 A.2d 1093. In the present case, the court found that the plaintiff met frequently with the town's authorized agent, Bouteiller, and, relying on Bouteiller's acts and statements, the plaintiff in good faith expended more than $100,000 after the zoning permit was issued for the construction of the proposed structure. As evidenced by the photographs in the record, the structure is partially completed. It is not clear what position the board would take if the court remanded this matter to the board. On the basis of its counsel's statements, it is possible that it would conclude that any construction would violate the town's setback regulations. See footnote 12 of this opinion. The court explicitly found that it "would be highly inequitable and oppressive" to allow the town to enforce its zoning regulations, as it has chosen to interpret them, under the circumstances of this case. The board has not demonstrated that the court's determination of the appropriate remedy to apply in this matter was improper.

The judgment is affirmed.

In this opinion the other judges concurred.

**All Citations**

137 Conn.App. 61, 46 A.3d 1005

Footnotes

1 The plaintiff filed a cross appeal, claiming that the court improperly determined that (1) the underlying zoning permit, which had never been appealed, could be reviewed by the board and (2) the plaintiff was not prejudiced by the board's action in upholding the cease and desist order on grounds that were unrelated to those raised by that order.
Because the plaintiff's appeal was sustained by the trial court, he was not aggrieved by the trial court's decision for purposes of

  

filing a cross appeal. This court, and the Supreme Court, in similar circumstances, have treated a cross appeal as an argument setting forth alternate grounds for affirming the trial court's judgment. See, e.g., *Wesley v. Schaller Subaru, Inc.*, 277 Conn. 526, 529 n. 1, 893 A.2d 389 (2006).
We affirm the judgment of the trial court on the ground decided by the trial court, however, and it therefore is not necessary to address the plaintiff's alternate grounds.

2 The April 23, 2008 zoning permit provided: "Restore existing non-conforming garage [and] build 1450 sq. ft. addition (28 x 63). As built survey required of foundation." The number "1450" was circled on the permit, and the notation "corrected to 1536" was written in the margin and initialed by Bouteiller.

3 The parties agreed that the plaintiff could present evidence related to his expenditures with respect to this particular project, and the trial court allowed the plaintiff's testimony and the submission of exhibits. In appeals from zoning boards, additional evidence is permitted only under certain circumstances. See General Statutes § 8–8(k)(2), which provides in relevant part: "The court shall review the proceedings of the board and shall allow any party to introduce evidence in addition to the contents of the record if ... it appears to the court that additional testimony is necessary for the equitable disposition of the appeal...."

4 An additional hearing was held on December 21, 2010, at which time the court questioned the parties regarding their posthearing briefs and issues related to the site visit.

5 Because municipal estoppel is an equitable claim, it is for the trial court and not the board to determine whether the conduct of municipal officials justifies the invocation of the doctrine. See *Bianco v. Darien*, 157 Conn. 548, 554–55, 254 A.2d 898 (1969); *Collins Group, Inc. v. Zoning Board of Appeals*, 78 Conn.App. 561, 581, 827 A.2d 764, cert. denied, 266 Conn. 911, 832 A.2d 68 (2003).

6 "No building or other structure, or part thereof, shall be constructed, reconstructed, enlarged, extended, moved or structurally altered until a Zoning Permit has been approved by the Zoning Enforcement Officer." Morris Zoning Regs., art. I, § 3.

7 Bouteiller explained at the zoning board hearing that the number he wrote on the permit was for the ground level footprint. Because there was to be no "living space" in the building, the zoning permit reflected the square footage of the foundation only.

8 The plaintiff's plans for the proposed building did not include bedrooms, a kitchen or a full bath.

9 The trial court made its determinations from the evidence submitted at the court hearing and from its review of the return of record submitted by the board.

10 We already have discussed the claim that the plaintiff misled Bouteiller and the board. The trial court, as the fact finder, found Bouteiller and the plaintiff to be credible.

11 With respect to the third factor required for establishing municipal estoppel, the defendants argue that the court could not properly find that the plaintiff changed his position in reliance on Bouteiller's statements because there was conflicting evidence as to the actual statements made by Bouteiller or because Bouteiller was not credible. We previously discussed those claims and found them to be without merit.

12 Although the defendants claim that many of the improvements would not be rendered useless if the plaintiff proceeded to build the one-story garage authorized by the zoning permit, we note that the defendants have not always taken consistent positions with respect to the size of the structure that the plaintiff legally could construct. The town attorney submitted an opinion letter for the zoning board hearing in which he opined that "the zoning enforcement officer approved a zoning permit for a one story structure 1450 sq. ft. in size, similar in style and appearance to the existing garage." At the court hearing held on August 24, 2010, counsel for the board and Geremia stated that because of certain issues regarding the setback from the road, it was not certain that even a one-story accessory garage could be built on the property.

End of Document

  

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Siegle v. Lee County, Fla.App. 2 Dist., March 2, 2016

190 Conn. 114
Supreme Court of Connecticut.
TOWN OF WEST **HARTFORD**
v.
Joseph P. **RECHEL** et al.

May 10, 1983.
|
Argued Feb. 3, 1983.
|
Decided May 10, 1983.

**Synopsis**
Town brought action to enjoin property owners from operating rooming houses on subject property. The Superior Court, Judicial District of Hartford-New Britain at Hartford, B. O'Neill, J., granted town injunctive relief, and property owners appealed. The Supreme Court, Peters, J., held that trial court erred in concluding that defendants could not assert the defense of estoppel, and in ruling, in the alternative, that defense of estoppel required proof that town had taken intentional action to induce reliance by property owners; although town's conduct constituted inducement to property owners to purchase the property, and although property owners did not fail to exercise due diligence in relying on that conduct, cause would be remanded for further proceedings, since Supreme Court could not, on the record before it, determine whether property owners had sustained so substantial a loss that the challenged injunction was highly inequitable or oppressive.

Error in part; further proceedings.

West Headnotes (7)

[1] **Zoning and Planning** Weight and sufficiency, equitable relief

Evidence in town's suit to enjoin property owners from operating premises as rooming or boarding houses sustained finding that the properties in question, while they had become rooming houses, had never been operated as accessory uses in conformity with applicable town regulations.

7 Cases that cite this headnote

[2] **Zoning and Planning** Estoppel or inducement
**Zoning and Planning** Time for proceedings

Zoning commission is not estopped by laches from enforcing its zoning laws.

10 Cases that cite this headnote

[3] **Zoning and Planning** Estoppel or inducement

In municipal zoning cases, estoppel may be invoked only with great caution, only when the resulting violation has been unjustifiably induced by an agent having authority in such matters, and only when special circumstances make it highly inequitable or oppressive to enforce the regulations.

47 Cases that cite this headnote

[4] **Zoning and Planning** Estoppel or inducement

Municipality can be estopped by erroneous acts of its officers from enforcing its zoning ordinances, as long as those officers act within the scope of their authority.

10 Cases that cite this headnote

[5] **Estoppel** Acts of officers or boards

It is only when the municipal agent acts in good faith, within the scope of his authority, but in

  

error, that the occasion for invocation of estoppel can arise.

8 Cases that cite this headnote

[6] **Estoppel** Intent

Inducement for the purposes of estoppel requires a mental state which is a general intent to act rather than a special intent to mislead; it is sufficient if actions are taken with an awareness that they would be relied upon, and it is not necessary to prove that the actions were intended knowingly to mislead the party claiming estoppel.

14 Cases that cite this headnote

[7] **Zoning and Planning** Estoppel or inducement

In town's suit to enjoin property owners from operating rooming houses on subject property, trial court erred in concluding that defendants could not assert the defense of estoppel, and in ruling, in the alternative, that defense of estoppel required proof that town had taken intentional action to induce reliance by property owners; although town's conduct constitute inducement to property owners to purchase the property, and although property owners did not fail to exercise due diligence in relying on that conduct, cause would be remanded for further proceedings, since Supreme Court could not, on the record before it, determine whether property owners had sustained so substantial a loss that the challenged injunction was highly inequitable or oppressive.

34 Cases that cite this headnote

**Attorneys and Law Firms**

**1016 *115 John R. Logan, East Hartford, with whom, on the brief, was Dwight O. Schweitzer, Hartford, for appellants (defendants).

Robert P. Volpe, Corp. Counsel, Hartford, for appellee (plaintiff).

Before *114 PETERS, HEALEY, PARSKEY, SHEA and GRILLO, JJ.

**Opinion**

PETERS, Associate Justice.

The principal issue in this case is whether a municipality can be estopped from enforcing **1017 its zoning regulations because of a longstanding pattern of conduct permitting unauthorized uses of private property. The plaintiff town of West Hartford, acting by its building inspector, Edward A. Dombroskas, sued to enjoin the defendants Joseph P. Rechel and Shirley T. Rechel from operating two rooming houses in the town. After a court trial, a permanent injunction was issued, from which the defendants have appealed.

The underlying facts found by the trial court in its memorandum of decision are essentially undisputed. The two properties owned by the defendants are located at 55 Highland Street and 739 Prospect Avenue, in an area zoned by the town of West Hartford as an R–10 district, which is a one-family residential *116 district. In such a district, rooming or boarding houses are permitted only as accessory uses, if the owner uses the premises as his own residence and limits the number of roomers to three or less. Rooming houses as main uses, without an owner in residence, are now and have been, since at least 1925, totally forbidden. Even as accessory uses, rooming houses require appropriate town licenses. These zoning regulations, although adopted in their present form in 1968, do not vary materially from regulations first adopted in 1945. Before 1945, rooming houses were permitted as accessory uses without any limit on the number of roomers who might share the houses with their resident owners.

The history of the disputed properties reveals that, prior to 1941, they were used for single family purposes. At some time during the early 1940's, both properties were converted into rooming houses, in which substantial numbers of boarders received room and board, with the owner retaining an apartment on the premises.[1] Thereafter, the properties became rooming houses without an owner in residence, and were so operated by the defendants, who bought the house on Highland Street in

  

1962 and the other, on Prospect Avenue, in 1965.

From 1949 to 1967, the town issued rooming house licenses to the defendants and their predecessors in title.[2] Despite the receipt of properly submitted applications for subsequent years, the town refused thereafter to take any action to issue further licenses. The building inspector wrote the defendants in 1969 to inform them *117 that their rooming houses, since they rented to more than three roomers, were not allowable uses in the town. The following year, however, town corporation counsel gave a formal opinion that the defendants' properties, because of their history of continuing use as boarding houses, qualified as legal nonconforming uses.[3] Despite that opinion, the town brought the present lawsuit in 1975.

The trial court, upon reviewing this finding of facts, came to the following conclusions of law. The properties were not, and never had been, operated as legal accessory uses. When first converted to rooming house use, the number of boarders was so disproportionate to the residential uses of the principal occupants that the uses did not qualify as accessory uses. Furthermore, even if the early uses had been accessory in nature, they had thereafter lost their accessory character by abandonment. The defendants, having themselves never resided on the properties and having operated them as businesses for the generation of income from roomers, could no longer rely on the prior uses. After abandonment, a prior legal use is lost and cannot be revived. **1018 *Blum v. Lisbon Leasing Corporation,* 173 Conn. 175, 181, 377 A.2d 280 (1977). The defendants had therefore failed to prove their special defense of "prior legal nonconforming use."

The trial court further concluded that the defendants could not prevail on their equitable defenses of laches and estoppel. With respect to laches, the court determined that the town had not unreasonably delayed its enforcement of its 1968 ordinances. With respect to estoppel, the court expressed doubt about the availability *118 of such a defense against a municipality and found an absence of "hard evidence" that the defendants had suffered any loss "because of any action of the town."

Finally, the trial court rejected the defendants' argument that the town had so far abandoned its zoning plan in the immediate area of the defendants' properties that enforcement of its regulations against the defendants was arbitrary and capricious. Having viewed the properties and the neighborhood, the court found no evidence either of abandonment of the town plan or of arbitrariness in its enforcement.

In their appeal from the trial court's order permanently enjoining their use of 55 Highland Street and 739 Prospect Avenue as rooming or boarding houses in violation of Article 4 of the town zoning regulations, the defendants rely principally on their arguments of estoppel and laches although they also contest the conclusion that they had not proven their acquisition of a nonconforming use.[4] We shall consider these claims in the reverse order, taking up first the question of legal nonconforming use.

[1] With regard to the legal status of their properties, the defendants now concede that they can prevail only if they can establish that the houses were actually used as accessory rooming houses before 1945. They dispute the trial court's contrary finding by pointing to evidence that the houses were in fact used as rooming houses in 1943 and 1948. This evidence is supported, they claim, by the town's subsequent issuance of rooming house licenses, which creates a presumption that the houses complied with the town's zoning ordinances.

*119 The fallacy in this argument is that it fails to overcome the trial court's finding that the rooming houses were being operated illegally as main uses, rather than legally as accessory uses, in the years at issue. It was not sufficient to establish that the owners then resided in the rooming houses. The defendants have not directly challenged the trial court's factual finding that there was a disproportion between the number of boarders and the resident owners but dispute instead its consequent conclusion that such a disproportion prevented the boarding uses from being "accessory." The defendants argue that such disproportion is irrelevant since it was not until 1945 that the town limited to three the number of roomers who could legally be housed in a residential accessory rooming house. It does not, however, follow that accessory use had no numerical limitation whatsoever before 1945. The trial court was, in our view, entirely within its province in inferring that the concept of accessory use necessarily required an inquiry into the extent to which actual uses were incidental to the underlying permitted residential uses of the property. See *Lawrence v. Zoning Board of Appeals,* 158 Conn. 509, 511–13, 264 A.2d 552 (1969); *Fox v. Zoning Board of Appeals,* 146 Conn. 70, 74–75, 147 A.2d 472 (1958). We therefore find no error in the trial court's conclusion that the properties, while they became rooming houses, were never operated as accessory uses in conformity with applicable town regulations.

The defendants' remaining arguments with respect to legal nonconforming uses cannot survive, once this first conclusion of the trial court is upheld. Subsequent town licensing is important for the defendants' **1019 claims of estoppel but cannot per se convert illegal main uses

  

into legal accessory uses. Given the other facts found by the trial court, the court was entitled to find that *120 any presumption of legality attaching to the issuance of the licenses had been adequately rebutted by the town's evidence of continued illegal uses. Finally, we need not review the defendants' claims that they never intended to abandon any legal uses of their property, since they are unable to prevail on nonabandonment without first establishing as its predicate the prior legality of the uses they seek to preserve.

[2] We turn then to the defendants' claim that the equitable principle of laches makes it improper for the town to enjoin their rooming houses even if these rooming houses are otherwise unauthorized under town regulations. The defendants acknowledge that *Bianco v. Darien,* 157 Conn. 548, 556, 254 A.2d 898 (1969), permitting a town to enforce its zoning ordinances after a thirty-six year lapse, stands in the way of their recovery on this theory. Whether we conclude, as did the trial court, that the town is enforcing its 1968 zoning enactments or, as the defendants maintain, its similar 1924 and 1945 ordinances, we are not prepared, in the circumstances of this case, to overrule our holding in *Bianco* that "[a] zoning commission 'is not estopped by laches from enforcing its zoning laws.' " Id.; see 3 Rathkopf, Law of Zoning and Planning (4th Ed.1982) § 45.05[2].

A defense based on laches would have us focus on the effect of inaction, of the mere passage of time. See 9 McQuillin, Municipal Corporations (3d Rev.Ed.1978) § 27.56. The defendants' final argument, however, focuses on affirmative conduct of the town which, they maintain, was of such a character as now to estop the town from obtaining an equitable remedy against them.

*121 [3] This court has recently restated the law of municipal estoppel. In *Zoning Commission v. Lescynski,* 188 Conn. 724, 731–32, 453 A.2d 1144 (1982), we held that, in special circumstances, a municipality may be estopped from enforcing its zoning regulations. We recognized that estoppel always requires "proof of two essential elements: the party against whom estoppel is claimed must do or say something calculated or intended to induce another party to believe that certain facts exist and to act on that belief; and the other party must change its position in reliance on those facts, thereby incurring some injury. *Bozzi v. Bozzi,* 177 Conn. 232, 242, 413 A.2d 834 (1979); *Dupuis v. Submarine Base Credit Union, Inc.,* 170 Conn. 344, 353, 365 A.2d 1093 (1976); *Pet Care Products, Inc. v. Barnett,* 150 Conn. 42, 53–54, 184 A.2d 797 (1962)." *Zoning Commission v. Lescynski,* supra 188 Conn. 731, 453 A.2d 1144. In municipal zoning cases, however, estoppel may be invoked "(1) only with great caution, (2) only when the resulting violation has been unjustifiably induced by an agent having authority in such matters, and (3) only when special circumstances make it highly inequitable or oppressive to enforce the regulations. *Dupuis v. Submarine Base Credit Union, Inc.,* supra 170 Conn. 354, 365 A.2d 1093." Id., 188 Conn. 732, 453 A.2d 1144; see also 8A McQuillin, Municipal Corporations (3d Rev.Ed.1976) § 25.349; 9 McQuillin, supra, § 27.56; 3 Rathkopf, Law of Zoning and Planning (4th Ed.1982) § 45.05 [1][b].

[4] [5] *Lescynski* puts to rest some of the controversy surrounding zoning estoppel. Contrary to the view of the plaintiff, a municipality can be estopped by erroneous acts of its officers from enforcing its zoning ordinances, as long as those officers act within the scope of their authority. The determination that the town's building inspector (who was also its zoning enforcement officer) acted erroneously in issuing rooming house licenses for *122 the premises in question does not, therefore, defeat the defendants' claim of estoppel. See *Town of Largo v. Imperial Homes Corporation,* 309 So.2d 571, 574 (Fla.App.1975); *Cities Service Oil Co. v. City of Des Plaines,* 21 Ill.2d 157, 160–63, 171 N.E.2d 605 (1961); *Abbeville Arms v. City of Abbeville,* 273 S.C. 491, 494, 257 S.E.2d 716 (1979); see also 3 McQuillin, Municipal Corporations (3d Rev.Ed.1982) **1020 § 12.126a; 3 Rathkopf, supra, § 45.05[3][b]. The building inspector was, pursuant to town ordinances, the proper person to issue such licenses and the proper person to certify that the rooming house was or would be in compliance with existing zoning regulations. Any other construction of who is "an agent having authority in such matters"; *Lescynski,* supra, 188 Conn. 732, 453 A.2d 1144; would entirely defeat any and all claims of estoppel. Had the municipal agent's conduct been in conformity with zoning regulations, his legally authorized acts would automatically have conferred indefeasible rights upon the claimant. It is only when the municipal agent acts in good faith,[5] within the scope of his authority, but in error, that the occasion for invocation of estoppel can arise. See *Jantausch v. Verona,* 41 N.J.Super. 89, 95, 124 A.2d 14 (1956), aff'd, 24 N.J. 326, 131 A.2d 881 (1957); see also 3 Rathkopf, supra, § 45.05[3][d].

The defendants therefore have a right, pursuant to *Lescynski,* to a defense based upon estoppel, if they can factually demonstrate its remaining components. The final question before us, therefore, is whether they have satisfied this substantial burden of proof. The defendants were required to show that the agents of the town acted to induce their reliance and that the defendants relied on the town's actions to their detriment to such *123 an extent that enforcement of the town's zoning regulations would

  

be "highly inequitable or oppressive." *Zoning Commission v. Lescynski,* supra, 188 Conn. 732, 453 A.2d 1144.

The trial court's determination that the defendants failed to establish their defense of estoppel appears to have been derived in part from its conclusion that zoning estoppel would never bind a municipality. That conclusion, reached before our decision in *Lescynski,* was in error. The trial court went on, however, to conclude in the alternative that the defendants had failed to prove that they had suffered "a loss by any action of the town." In context, the court seems to have found a failure to show intentional action by the town calculated to induce reliance on the part of the defendants.[6] On this basis, the court found it unnecessary to deliberate the other criteria of estoppel which the defendants would have had to establish before their defense could prevail.

[6] The facts upon which the defendants rely to show inducement are the rooming house licenses issued from 1949 to 1966, whose legitimacy was attested by two separate opinions of two town corporation counsel, one in 1957 and one in 1970. The defendants testified without contradiction that they inquired into the availability of rooming house licenses before they bought their properties. They applied for a license for one of the houses in 1962 while they were still negotiating its purchase. Even though the building inspector had no personal contact with the defendants, he was fully aware of the uses to which the defendants and their predecessors in title intended to put the property. In these circumstances the pattern of officially licensing the properties as rooming houses constituted an inducement to the defendants to purchase them for ***124** the same purpose. Inducement for the purposes of estoppel requires a mental state which is a general intent to act rather than a special intent to mislead. It is sufficient if actions are taken with an awareness that they would be relied upon; it is not necessary to prove that the actions were intended knowingly to mislead the party claiming estoppel. See *Evanston v. Robbins,* 117 Ill.App.2d 278, 286, 254 N.E.2d 536 (1969). The trial court's ruling to the contrary was therefore in error.

****1021** [7] The facts found by the trial court similarly establish that the defendants did not fail to exercise due diligence when they relied upon the conduct of the town. While it may be true, as the plaintiff argues, that the relevant town ordinances were available for the defendants' inspection, it is equally true that the defendants, as lay persons, could not reasonably be expected to detect problems with apparent prior conforming uses that two separate corporation counsel had been unable to uncover. In the circumstances, it was not unreasonable for the defendants to assume that the rooming houses which they were purchasing constituted legal rather than illegal nonconforming uses. Although the plaintiff takes the defendants to task for undertaking "an obviously incomplete and inadequate investigation," the plaintiff does not specify what more the defendants should have done. This element of estoppel is therefore also proven.

The final element of estoppel which the trial court did not reach cannot however be determined on the present record. As we have previously noted, the defendants must show not only unjustifiable inducement but also reliance of such a nature that it would be "highly inequitable or oppressive to enforce the [town's zoning] regulations." *Zoning Commission v. Lescynski,* 188 Conn. 724, 732, 453 A.2d 1144 (1982). ***125** On the issue of reliance, the record discloses testimony by the defendants that the market value of their properties reflected their assumed rooming house status, and that their properties had been altered by substantial expenditures consistent with their boarding house use. The record further discloses a neighborhood which, despite some nonresidential uses, the trial court, after inspection, found not inconsistent with town enforcement of rooming house zoning regulations. There is, however, nothing before us to show that in granting the injunction, the trial court undertook the process of weighing competing equitable considerations to determine whether the town's conduct, the extent of the defendants' reliance and the condition of the neighborhood, warranted the equitable relief sought by the town. Such a weighing process involves the exercise of discretion by the trier of fact and not by an appellate tribunal. Because we cannot tell whether this is one of the special cases in which zoning estoppel, although only invoked with great caution, is appropriate, there must be a new trial on this remaining aspect of the defense of estoppel.

We recognize that this litigation has been of long duration. Our remand is not intended to permit retrial of anything other than that aspect of estoppel which requires the defendants to prove so substantial a loss that the award of injunctive relief to enforce the town's zoning regulations would, in light of all the circumstances, be highly inequitable or oppressive.

There is error, the judgment is set aside, and the case is remanded for further proceedings in accordance with this opinion.

  

In this opinion the other Judges concurred. 190 Conn. 114, 459 A.2d 1015

**All Citations**

Footnotes

1 There was evidence that twenty or more boarders were living in one of the houses.

2 In accordance with town ordinances, the building inspector charged with issuing rooming house licenses may do so only if "the location of said rooming house complies with the zoning regulations." West Hartford ordinance § 14.3.4. The building inspector is the town's zoning enforcement officer.

3 In 1959, corporation counsel had issued a similar opinion for the Prospect Avenue property.

4 The appeal does not directly take issue with the trial court's conclusion that there was nothing capricious or arbitrary in the town's decision to enforce its zoning regulations against them. The defendants do, however, advert to the character of the surrounding neighborhood in their claim of estoppel.

5 The trial court's ruling that the properties had never achieved a legal accessory use, while correct, was not so obvious a conclusion that the town's officials (or the defendants) can be faulted for having failed to anticipate it.

6 Due to the death of the trial court judge while this appeal was pending, we cannot remand for further articulation of the memorandum of decision.