2005 WL 2007175
Only the Westlaw citation is currently available.

Court of Appeals of Nebraska.

CITY OF MINDEN, Nebraska, a municipal corporation, appellee,
v.
Mike SUMSTINE, appellant.

No. A-04-634. | Aug. 23, 2005.

Appeal from the District Court for Kearney County: Stephen Illingworth, Judge. Affirmed.

Attorneys and Law Firms

Bradley D. Holbrook, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellant.

Thomas G. Lieske, of Lieske Law Firm, for appellee.

INBODY, Chief Judge, and CARLSON and MOORE, Judges.

Opinion

MOORE, Judge.

INTRODUCTION

***1** The City of Minden, Nebraska (the City), initially filed an action in the district court for Kearney County, alleging that Mike Sumstine was operating certain real properties as a public nuisance in violation of local ordinances. Before trial, the parties settled their dispute and entered into a stipulation and agreement, which agreement was approved by the district court. Sumstine subsequently filed two separate motions, seeking orders to show cause and ex parte temporary restraining orders to restrain the City from entering onto Sumstine's real properties in violation of the stipulation. The court entered the ex parte temporary restraining orders as requested and, after further hearing, entered temporary injunctions continuing the ex parte orders. Upon final hearing, the court granted in part Sumstine's request for a permanent injunction and overruled in part Sumstine's request. The court subsequently overruled Sumstine's motion for new trial, and Sumstine appeals. For the reasons stated herein, we affirm.

BACKGROUND

Sumstine is the sole proprietor of a used-car lot in Minden, located on the property designated as "Location 1" in the stipulation. Sumstine describes himself as a wholesaler, in that he purchases cars from auction houses, as well as trade-in cars from local dealerships. He does not deal much in late-model new cars. Sumstine purchases some cars that do not run, but Sumstine purchases every car with the intent to resell it "[s]ome way, somehow." In the case of cars that do not run, Sumstine will either overhaul them into running condition or use them as parts for other cars he can overhaul.

The City filed the operative petition on October 21, 1999, alleging that Sumstine was operating certain real properties as a public nuisance and in violation of certain local zoning ordinances. Sumstine answered, generally denying the City's allegations and setting forth various affirmative defenses.

The parties entered into settlement negotiations, which resulted in a stipulation and agreement (hereinafter the stipulation) being filed with the district court on February 16, 2001. In the stipulation, the parties acknowledged that Sumstine operated a used-car business within and subject to the zoning and nuisance ordinance of the City at three separate locations, identified within the stipulation as "Locations 1, 2, and 3." Location 3 was not included in the stipulation, because Sumstine had received separate prior authorization from the City to operate Location 3 as an automobile salvage facility. The parties agreed that any future properties purchased by Sumstine would be considered "part of this agreement." Sumstine agreed to comply with all existing ordinances of the City. Sumstine further agreed to remove all vehicles from Location 2, to remove all inoperable vehicles from Location 1, and not to place any additional inoperable vehicles "in any state of repair" upon Locations 1 or 2. The parties defined

"inoperable vehicles" in relevant part as vehicles "unfit for resale because of the great extent of unrepairable or unworkable parts." The parties agreed that Sumstine would organize and operate Location 1 as "an attractive used car lot" and that Sumstine could petition the City for rezoning of a portion of Location 2 to permit the inventory storage of "used cars that are operable and for sale." The parties agreed to present the stipulation to the court for approval and that Sumstine would have 24 months from the court's approval to comply with all parts of the stipulation. The stipulation provided that in the event Sumstine failed to comply with its terms, the City could enter Sumstine's property and proceed to "do the work set out" in the stipulation.

***2** The district court entered a judgment and order on February 16, 2001, approving the stipulation and ordering the parties to comply with the stipulation in all respects.

Subsequently, Sumstine purchased additional real property, legally described as "Lots One (1), Two (2), Three (3), Four (4) and Six (6) of Amjo Development, a subdivision to the City ..., Kearney County, Nebraska" (the Amjo Lots). Sumstine began removing the vehicles from Location 2 and placing those vehicles on the Amjo Lots.

On April 25, 2003, the City notified Sumstine of its intent to enter upon the Amjo Lots and begin removing Sumstine's vehicles. Sumstine understood that the City's intent was to remove the vehicles and destroy them by crushing them for scrap iron. Sumstine filed a motion on April 30, seeking an order to show cause why the City should not be held in contempt for failure to comply with the Court's order of February 16, 2001. Sumstine also sought an ex parte temporary restraining order. The court entered an order to show cause on April 30, 2003, and granted the ex parte temporary restraining order restraining the City from entering upon Sumstine's real property. Following further correspondence from the City with regard to its intent to enter upon Location 1 and begin removal of Sumstine's vehicles, Sumstine filed a second motion seeking a show cause order and an ex parte restraining order, both of which were granted by the court.

After a hearing on the orders to show cause and ex parte temporary restraining orders, the district court entered an order on August 1, 2003, finding that the City's proposed course of action would produce irreparable injury to Sumstine. The court issued a temporary injunction restraining the City from entering upon Sumstine's real property, as described in the temporary restraining orders, in order to remove vehicles. The court set the matter for final hearing on the orders to show cause and for permanent injunction.

The final hearing was held before the court on September 22 and November 12, 2003. Sumstine testified generally about the nature of his business as set forth above and testified that he operates his retail sales business from Location 1 and uses the Amjo Lots for display of inventory. Sumstine testified that the Amjo Lots were his only property with "enough room" to store his vehicle inventory removed from Location 2. Sumstine testified that he was led to believe by the previous owner of the Amjo Lots that they were all zoned industrial. When Sumstine began removing inventory from Location 2, he initially moved this inventory to Amjo Lots 2, 3, and 4 because of his understanding that these lots had an industrial zoning classification. Sumstine testified that he later was presented with information by the City suggesting that Amjo Lot 1 and part of Amjo Lot 2 were not zoned industrial. Sumstine testified that as of the date of the hearing, he was uncertain of the zoning classification of Amjo Lot 1 and a portion of Amjo Lot 2. Sumstine admitted that he had vehicles in his inventory that required some additional work before their engines would run. Sumstine testified, however, that he could resell every vehicle in his present inventory.

***3** The general manager of an automobile auction house in Lincoln, Nebraska, testified that he was familiar with Sumstine's used car operation and had inspected Sumstine's vehicle inventory. He opined that Sumstine's vehicle inventory had a resale value and that the vehicles could be resold through the auction house he managed.

The parties stipulated during the course of the final hearing that Amjo Lots 3, 4, and 6 had an industrial zoning classification. The parties disputed the zoning classification of Amjo Lot 1 and a portion of Amjo Lot 2. Exhibit 29, the city clerk's file of zoning regulations relevant to the classification of the Amjo Lots, was received without objection. The court received evidence indicating that the Amjo Lots were all zoned industrial at some point in time. Other evidence in the record indicates that as of the final hearing, Amjo Lot 1 and a portion of Amjo Lot 2 were zoned agricultural. Exhibit 29 includes ordinance No. 1095, dated March 17, 2003. Ordinance No. 1095 adopts the City's zoning and extraterritorial maps dated March 17, 2003, and provides that "any other ordinance or section passed and approved prior to the passage, approval and publication or posting of this

ordinance and in conflict with its provisions is hereby repealed." The City's current zoning map was not included in exhibit 29 but was admitted into evidence separately, over Sumstine's foundation objection. Exhibit 30, the current zoning map, shows that a part of the Amjo Lots is zoned agricultural.

Brent Lewis, the city administrator, testified that the Amjo Lots had been subject to the City's zoning jurisdiction since 1987 or perhaps even prior to that time. Lewis testified that ordinance No. 1095 was the ordinance he would rely on for zoning of the Amjo Lots, although the ordinance did not specifically state what the current zoning of the Amjo Lots was. Lewis testified that he would ultimately have to refer to the current zoning map for the zoning classification of the Amjo Lots. Lewis testified that ordinance No. 1095 was not the ordinance that actually changed the zoning of the Amjo Lots from agricultural to industrial. Lewis testified that he did not draft exhibit 30, that he assumed prior zoning maps were used to draft the current zoning map, and that it was possible that prior errors existed on the current zoning map. Lewis also testified, without objection, that Amjo Lot 1 and a portion of Amjo Lot 2 were zoned differently than the remaining Amjo Lots. On direct examination, Sumstine questioned Lewis about the zoning of Amjo Lots 1 and 2 and about various things shown on exhibit 30. Lewis testified on direct examination, in response to questioning by Sumstine's counsel, that Amjo Lots 1 and 2 are agriculturally zoned. On cross-examination, over hearsay and foundational objections from Sumstine, Lewis again testified that the current zoning classification of Amjo Lots 1 and 2 was agricultural.

On March 25, 2004, the district court entered an order ruling on the matters before it. The court overruled Sumstine's "Motion for Enforcement of Judgment and Order," finding that "although there was a stipulation between the parties [,] the resulting Order left some unresolved conflicts between the city code definition of inoperable car and the agreement of the parties." In considering the request for a permanent injunction, the court stated that the issues before it were whether Sumstine's vehicles were operable or inoperable and whether the location where the vehicles were stored allowed for such storage. The court identified a collateral issue of whether the stipulation or the city code controlled the definition of "inoperable" as to real property acquired by Sumstine after the stipulation. The court concluded that the definition of "inoperable" in the stipulation was controlling even for after-acquired property. The court found that all of Sumstine's vehicles on the Amjo Lots were fit for resale and thus were permitted under the stipulation. The court granted a permanent injunction in favor of Sumstine and against the City as to Amjo Lots 3, 4, and 6, finding that these lots were industrially zoned and that such zoning classification permitted the storage of Sumstine's vehicle inventory. The court found that the Amjo Lots 1 and 2 were zoned agricultural, which zoning classification did not permit the storage of Sumstine's vehicle inventory. Accordingly, the court denied a permanent injunction as to Amjo Lots 1 and 2. Finally, the court denied a permanent injunction as to Location 1. The court found that the stipulation modified the definition of "inoperable" as to Location 1 because the stipulation provided that Location 1 would be organized and operated as an "attractive used car lot." The court found it clear from the zoning classification of Amjo Lots 3, 4, and 6 and the definition of "inoperable" in the stipulation that "non-running cars" could be stored on Amjo Lots 3, 4, and 6. The court reasoned, however, that "those types of vehicles" would not be consistent with an "attractive used car lot." The court concluded that inoperable cars, therefore, would not be permitted at Location 1. The district court subsequently overruled Sumstine's motion for new trial, and Sumstine perfected his appeal.

ASSIGNMENTS OF ERROR

***4** Sumstine asserts that the district court erred in (1) finding that Amjo Lots 1 and 2 were zoned agricultural, (2) failing to issue a permanent injunction in favor of Sumstine and against the City on Amjo Lots 1 and 2, (3) finding that the operation of a used-car lot at Location 1 was inconsistent with the storage of nonrunning vehicles, and (4) failing to issue a permanent injunction in favor of Sumstine and against the City on the Location 1 property.

STANDARD OF REVIEW

An action for injunction sounds in equity. *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and

may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Rauscher v. City of Lincoln,* 269 Neb. 267, 691 N.W .2d 844 (2005).

In proceedings where the Nebraska rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility. *In re Estate of Jeffrey B.,* 268 Neb. 761, 688 N.W.2d 135 (2004).

The meaning of a contract and whether a contract is ambiguous are questions of law. *Big River Constr. Co. v. L & H Properties,* 268 Neb. 207, 681 N.W.2d 751 (2004). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

ANALYSIS

Amjo Lots 1 and 2.

Sumstine asserts that the district court erred in finding that Amjo Lots 1 and 2 were zoned agricultural and in failing to issue a permanent injunction in favor of Sumstine and against the City as to these lots. Specifically, Sumstine asserts that certain of Lewis' testimony about the agricultural zoning classification of Amjo Lots 1 and 2, as well as his testimony about exhibit 30, the current zoning map, should not have been admitted into evidence over his foundation and hearsay objections. We observe that Sumstine's counsel elicited testimony from Lewis concerning the zoning classification of Amjo Lots 1 and 2. Upon direct examination by Sumstine's counsel, Lewis testified that Amjo Lots 1 and 2 are zoned agricultural. Sumstine's counsel also questioned Lewis about various things shown by exhibit 30. Sumstine did not object or ask that any of this testimony be stricken from the record. Failure to make a timely objection waives the right to assert prejudicial error on appeal. *Steele v. Sedlacek,* 267 Neb. 1, 673 N.W.2d 1 (2003). Further, Sumstine cannot now complain of this portion of Lewis' testimony to the extent that he "invited" this error by his direct examination of Lewis. A party cannot complain of error which that party has invited the court to commit. *In re Estate of Jeffrey B.,* 268 Neb. 761, 688 N.W.2d 135 (2004). Finally, we observe that testimony objected to which is substantially similar to evidence admitted without objection results in no prejudicial error. *Koehler v. Farmers Alliance Mut. Ins. Co.,* 252 Neb. 712, 566 N.W .2d 750 (1997). Similarly, evidence objected to which is substantially similar to evidence admitted without objection results in no prejudicial error. *In re Estate of Jeffrey B., supra.* Because the testimony objected to on cross-examination of Lewis by the City was substantially similar to testimony elicited from Lewis on direct examination by Sumstine's counsel, no prejudicial error results. Likewise, no prejudicial error resulted from the district court's admission of exhibit 30 into evidence. While it is true that Lewis did not draft exhibit 30 and Lewis admitted that previous zoning errors could have been incorporated into the current zoning map, such evidence goes more to the weight of exhibit 30 as evidence rather than to its admissibility. Exhibit 30 was identified without objection as being the current zoning map, and such a document is clearly the type of document relied upon by Lewis in the course of his duties as city administrator and, in particular, as zoning administrator. The district court did not err in finding that Amjo Lots 1 and 2 were zoned agricultural and thus did not err in failing to issue a permanent injunction in favor of Sumstine and against the City as to these lots. Sumstine's assignments of error as they relate to the Amjo Lots are without merit.

Location 1 Property.

***5** Sumstine asserts that the district court erred in finding that the operation of a used-car lot at Location 1 was inconsistent with the storage of nonrunning vehicles and in failing to issue a permanent injunction in favor of Sumstine and against the City as to the Location 1 property. Sumstine argues that the court improperly construed the plain and ordinary meaning of the parties' stipulation.

When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them. *Midwest Neurosurgery v. State Farm Ins. Cos.,* 268 Neb. 642, 686 N.W.2d 572 (2004). In such a case, a court shall seek to ascertain the intention of the parties from the plain language of the contract. *Misle v. HJA, Inc.,* 267 Neb. 375, 674 N.W.2d 257 (2004). A contract must be construed as a whole, and if possible, effect must be given to every part thereof. *Big River Constr. Co. v. L & H Properties,* 268 Neb. 207, 681 N.W.2d 751 (2004).

Unless a contract is ambiguous, parol evidence cannot be

used to vary its terms. *Id.* In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous. *Id.* A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Jensen v. Board of Regents,* 268 Neb. 512, 684 N.W.2d 537 (2004). The fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous. *Boutilier v. Lincoln Benefit Life Ins. Co.,* 268 Neb. 233, 681 N.W.2d 746 (2004).

The stipulation provided that all "inoperable" vehicles would be removed from Location 1, that no additional "inoperable" vehicles "in any state of repair" would be placed on Locations 1 or 2, and that Location 1 would be organized and operated as an "attractive used car lot." The stipulation defined "inoperable" as "unfit for resale because of the great extent of unrepairable or unworkable parts." The stipulation does not define the phrases "attractive used car lot" and "fit for resale."

In its March 25, 2004, order, the district court found that both vehicles that "run" and vehicles that "don't run" were stored on the Amjo Lots. The court concluded that all vehicles stored on the Amjo Lots were "fit for resale" and that the stipulation allowed "non-running cars" to be stored on Amjo Lots 3, 4, and 6. In other words, as to the Amjo Lots, the court concluded that the definition of "inoperable" included vehicles that do not run. In contrast, as to Location 1, the court concluded that storage of vehicles that do not run is inconsistent with the requirement in the stipulation to operate Location 1 as an "attractive used car lot." The court stated that the requirement to operate Location 1 as an "attractive used car lot" served to modify the definition of "inoperable" as to Location 1. The court ordered Sumstine to remove any "inoperable" vehicles from Location 1 within 30 days of its order, but it is clear that the court intended to order Sumstine to remove any "non-running" vehicles from Location 1. Essentially, the court held that the definition of "inoperable" as to Location 1 includes all vehicles that do not presently "run," regardless of whether they can be made to "run" at some point in the future.

***6** Sumstine argues that the nonrunning vehicles in his inventory are fit for resale, in that he can ready them for sale at some point in the future. Sumstine argues that because these vehicles are "fit for resale," they fall outside of the parties' definition of "inoperable" and thus can be stored or displayed at Location 1. Sumstine argues that because the parties did not use terminology distinguishing between vehicles that run and vehicles that do not run in their definition of "inoperable," the court's exclusion of nonrunning cars from Location 1 does not give effect to the definition used by the parties. Sumstine's argument, however, ignores another crucial portion of the stipulation, that being the provision that no additional "inoperable" vehicles "in any state of repair" would be placed on Location 1. The use of the phrase "in any state of repair" contemplates that vehicles in Sumstine's inventory might be in the process of being repaired and readied for resale. Thus, by its terms, the stipulation excludes from Location 1 those vehicles that are "operable" in the sense that they can be resold at some point but are in the process of being readied for sale. It seems that the phrase "in any state of repair," rather than the phrase "attractive used car lot" focused on by the district court, works to modify the definition of "inoperable" as to Location 1. Although we have used slightly different reasoning than that used by the district court, we cannot say that the result reached, that is, the exclusion from Location 1 of vehicles that "do not run," is incorrect. In reaching this result, we construe the stipulation as a whole and give effect to all parts of the stipulation. The district court did not err in finding that the stipulation precludes the storage on Location 1 of vehicles that do not run and thus did not err in failing to issue a permanent injunction in favor of Sumstine and against the City as to the Location 1 property. Sumstine's assignments of error as they relate to the Location 1 property are without merit.

CONCLUSION

The district court did not err in finding that Amjo Lots 1 and 2 were zoned agricultural and in not issuing a permanent injunction in favor of Sumstine on said lots. The district court did not err in finding that the operation of a used-car lot at Location 1 was inconsistent with the storage of nonrunning vehicles and in not issuing a permanent injunction in favor of Sumstine on said property.

Affirmed.

End of Document