IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

CITY OF WILLIAMSPORT BUREAU OF CODES	**:**	**No. CP-41-SA-64-2015**
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
JOHN DERAFFELE,	**:**	
Appellant	**:**	**1925(a) Opinion**

OPINION IN
COMPLIANCE WITH RULE 1925(a) OF
THE RULES OF APPELLATE PROCEDURE

On or about July 23, 2015, the City of Williamsport Bureau of Codes ("Codes") received a complaint about the residence located at 814 Hepburn Street. The complainant stated that a woman and several children were living in the residence and all of the utilities were shut off. The complainant also indicated that the children were going outside to go to the bathroom. On July 27, 2015, Thomas Evansky, III, a Codes enforcement officer, went to the residence to investigate the complaint. The water was on, but the electricity was not. Mr. Evansky condemned the structure as being unfit for human habitation. He posted the structure with a notice and mailed a copy of the notice to the owner, Appellant John DeRaffele. The posted notice clearly stated the structure must be vacated by 4:00 p.m. July 27, 2015 and any "person who removes the placard or occupies these premises shall be liable, if convicted, to the penalties provided by law."

The placard condemning the property indicated that Codes was condemning it for not complying with the ICC International Property Maintenance Code (IPMC), Ordinance No. 1741, specifically IPMC 108.1.3. (See City Exhibit 3).

Mr. Evansky mailed a notice of condemnation to Appellant dated July 23, 2015, which was the date Codes received the complaint as opposed to the date the complaint was actually investigated or the date the notice was prepared or mailed. The notice described the code violation as IPM 108.1.3 – STRUCTURE UNFIT FOR HUMAN USE AND OCCUPANCY. Section 108.1.3 was quoted and below the quote was written:

> 814- NO ELECTRICITY – STRUCTURE TO REMAIN UNOCCUPIED UNTIL ALL PROPERTY MAINTENANCE CODE VIOLATIONS HAVE BEEN ELIMINATED AND A SATISFACTORY INSPECTION HAS BEEN COMPLETED BY THE BUREAU OF CODES.

The notice ended with the sentence, "Failure to comply with this notice may subject your property to Condemnation proceedings as provided by law."

Appellant's tenant restored the electricity on July 28, 2015. Appellant's representative, Robert Setzler, called to notify Codes that the electricity had been restored. He did not reach Mr. Evansky, but left a message. Mr. Setzler called and spoke to another Codes officer, Ed Kiessling.

Mr. Evansky did not return to the property until September 18, 2015. On that date, the electricity was on but the placard had been removed and tenants were residing in the premises. Mr. Evansky obtained a copy of the tenants' lease and determined that the premises had been leased since September 1, 2015.

Mr. Evansky cited Appellant for allowing occupancy of a condemned and placarded structure in violation of section 108.5 of the IPMC. Appellant was convicted of the violation before the Magisterial District Judge (MDJ) and filed a summary appeal with the Court of Common Pleas.

The court held hearings on Appellant's summary appeal on February 5, 2016[1] and March 28, 2016. The court denied the summary appeal in its Opinion, Verdict and Order docketed on April 8, 2016 and directed Appellant to pay the costs of prosecution and a fine.

Appellant filed an appeal. On appeal, Appellant asserts the following issues:

> 1. Burden of proof – It was the duty of the [City]- Code[s] Department to prove appellant guilty of the summons issued allowing re-entry. In addition, it was the duty of the [City Codes] to prove the ordinance was adopted properly. The appellant believes neither [was] done at the trial as the trial and appellant brief will prove.
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> 2. The appellant was denied witnesses to prove his case when the court refused the subpoenas for Mayor Gabriel Campana, Mr. Joseph Girardi, and the City Clerk on technical grounds. These witnesses would have proved that the ordinance was not adopted properly and that it was not available to be reviewed as required which would invalidate the ticket/summons given to appellant. Appellant was denied witnesses in his defense of [the] quasi-criminal ticket.
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> 3. The order presented by the court is contrary to the weight of the evidence presented at the trial as the transcript will prove.
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> 4. The court refused to address the issue of the IPMC being copyrighted and the method required to be adopted by a jurisdiction as laid out in the 2015 IPMC book that was supplied to the court at trial. None of the procedures were followed by the City of Williamsport. The court was provided with the ICC list of approved jurisdictions from 2003-2015 absent of the [C]ity of Williamsport.
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> 5. The court misinterpreted the PA Code in adopting an ordinance because it addresses what the jurisdiction can do but not what must be done prior with a copyrighted product before the PA Code cut in. It violates

[1] In its Opinion, Verdict and Order, the court incorrectly stated that it held a conference on February 2, 2016 and a hearing on March 28, 2016. In actuality, a brief evidentiary hearing was held on February 5, 2016, at which the City presented testimony from Mr. Evansky regarding the ordinance adopting the 2003 IPMC and its inclusion of subsequent editions; the remainder of the hearing was continued to March 28, 2016. On October 27, 2016, the court sent a letter to Appellant notifying him of this error and providing him with the phone number of the court reporter so that if Appellant wished to order the transcript of the February 5, 2016 hearing for this appeal, he could do so.

federal copy[right] laws.

6. The PA statutes allow for the circumvent[ion] of federal copyright laws and requirement[s] and allowed for the violation of appellant's Fourteenth Amendment Right of Due Process regarding the absence for notice to cure prior to the condemnation of 816 Hepburn Street as the transcript will show and the testimony of Thomas Evansky, code inspector.

7. It appears to the appellant the "good olde boy" system kicked in with the pretrial motion to quash and the denial of the witnesses and how it transpired when appellant had no opportunity to respond to solicitor J. David Smith[']s claims to Honorable Judge Butt[s] prior to her decision on the bench to deny the subpoenas submitted.

8. The appellant believes the restriction of 3 hours to try this case and the important issues involved especially the legality of the use of the IPMC was an undue hardship on appellant and even though the appellant believes the evidence submitted was in his favor and the decisions should have been in his favor and additional half day would have eased the burden to rush appellant testimony and allow more details to the court in an organized manner by appellant in presenting his case to the court.

9. The court[']s commentary at the end of trial to [the City] solicitor and his chief witness, Mr. Thomas Evansky, shows the court got it and was fully aware of appellant[']s issues. The appellant will address these issues in his brief of his appeal on the evidence presented at the trial, the trial transcripts and the court papers set forth prior to the trial.

For clarity and consistency, the court will first address Appellant's challenges to the validity of the ordinance (including Appellant's copyright claims). Thereafter, it will address the claims related to the Honorable Nancy Butts quashing Appellant's subpoenas and the challenges to the sufficiency and weight of the evidence.

Appellant contends that the 2015 IPMC was never properly adopted by the City because: (1) the City never passed an ordinance specifically adopting the 2015 IPMC; (2) the City was not on the International Code Council (ICC) list of approved jurisdictions from 2003 through 2015; (3) the City's adoption and use of the 2015 IPMC was not in compliance

with the ICC's statements regarding adoption contained in the 2015 IPMC; and (4) the City's adoption and use of the 2015 IPMC violated federal copyright law.

The City conceded that it never passed an ordinance specifically adopting the 2015 IPMC, but it argued that such was not necessary under Pennsylvania law. Instead, the City argued that it properly adopted a prior version, the 2003 IPMC which, by the terms of the ordinance and as a matter of Pennsylvania law, encompassed subsequent editions of the IPMC, including the 2015 IPMC. The City also asserted that the ICC list of jurisdictions, the ICC statements regarding adoption, and the federal copyright law were irrelevant.

The ordinance was properly adopted. In 2004, the City passed an ordinance, which adopted the 2003 IPMC. The ordinance was introduced into evidence as Williamsport Exhibit #2. The City was authorized by statute to adopt a property maintenance code without such a code having been previously adopted by the Commonwealth of Pennsylvania. 11 Pa.C.S. §141A04(a) (formerly 53 P.S. 39104-A)[2] ("Notwithstanding the primacy of the Uniform Construction Code, a city may enact a property maintenance ordinance, including a standard or nationally recognized property maintenance code or a change or variation."). Pennsylvania law also provides that an ordinance adopting by reference any standard or nationally recognized code shall encompass any subsequent changes in the code unless

[2] The court has included both citations to the Third Class City Code, because at the time the codes official investigated the property, the Third Class City Code was codified in Title 53 of the Pennsylvania Statutes but by the time of the de novo summary appeal hearing the Third Class City Code was contained in Title 11 of the Pennsylvania Consolidated Statutes.

otherwise specified in the ordinance. 11 Pa.C.S. §11018.13 (formerly 53 P.S. §36018.13).

The ordinance did not specify otherwise. In fact, the ordinance specifically included later editions of the IPMC when it stated: "each and all of the regulations, provisions, penalties, conditions and terms of said *Property Maintenance Code* are hereby referred to, adopted, ad made a part hereof, as if fully set out in this ordinance, with the additions, insertion, deletions and changes, if any, prescribed in Section 2 of this ordinance. All subsequent editions shall be filed therewith." Williamsport Exhibit #2, Section 1.

The ICC list of jurisdictions that had adopted the IPMC was never admitted into evidence. Appellant attempted to cross-examine Mr. Evansky with the list, but Appellee's counsel objected. The court did not permit Appellant to introduce the list or question Mr. Evansky about it, because Appellant could not properly authenticate the list. N.T., March 28, 2016, at 54-55. Furthermore, the list was irrelevant. The list did not show that the City failed to comply with Pennsylvania law in enacting the ordinance, which adopted the 2003 IPMC and all subsequent editions; it only showed that the ICC was not aware that the City had adopted these editions of the IPMC and was utilizing them between 2004 and 2015.

Appellant's claims concerning the ICC's statements regarding adoption of the 2015 IPMC and federal copyright law are also irrelevant. Pennsylvania law governs the manner in which municipalities such as the City adopt ordinances. The ICC is not an entity that has any authority to pass, veto or interpret Pennsylvania law. Those functions belong to the Pennsylvania legislature, Governor Wolf, and the judiciary, respectively.

Appellant also misconstrues the purpose and effect of the two paragraphs regarding adoption of the 2015 IPMC contained in the preface thereto. Those paragraphs do not restrict

the City's ability to pass an ordinance adopting the IPMC. Instead, the purpose of those paragraphs is to make sure that the ICC's ability to fund its mission through sales of books, in both print and electronic format, is protected. The ICC wants jurisdictions to adopt and use the IPMC; it just wants the jurisdictions to protect its copyright when doing so that the ICC can still make money by selling copies of the IPMC.

Federal copyright law also does not affect the validity of the ordinance or Appellant's conviction for violating the ordinance. The ICC is simply the owner of the copyright for the IPMC. If the City violated federal copyright laws, the ICC might have a claim against the City for copyright infringement. See 17 U.S.C. §501, et seq. Appellant, who does not own or have any interest in the copyright of the IPMC, does not have standing to assert a copyright violation in this case or any other. See ***Malibu Media LLC v. Doe***, 82 F. Supp. 3d 650, 658 (E.D. Pa. 2015)("Malibu Media of course has no standing to complain of infringement of works to which it does not hold the copyrights."); ***Clarity Software, LLC v. Fin. Independence Group, LLC***, 51 F.Supp.3d 577, 583 (W.D. Pa. 2014)("the only proper plaintiff with standing in this action for infringement, i.e., the real party in interest, is the one who owns the copyright.").

Similarly, copyright infringement does not divest the City of its authority to enforce its duly enacted ordinances. The court explained to Appellant during the hearing that he was "mixing apples and oranges." N.T., March 28, 2016, at 59. The fact that the IPMC was copyrighted just meant that it could not be reproduced in certain ways. *Id*. In other words, the ICC had the exclusive right to authorize the reproduction and distribution of copies of the IPMC. See 17 U.S.C. §106. The copyright, however, did not give the ICC any authority to

dictate what ordinances the City could adopt or how adopted ordinances would be enforced in the City.

Appellant contends the court denied him witnesses when it denied subpoenas for Gabriel Campana, Joseph Girardi and the City Clerk on technical grounds. He also asserts that he was denied the opportunity to respond to the solicitor's claims before Judge Butts rendered her decision.

Appellant sent subpoenas to compel the testimony of Chief Codes Officer Joseph Girardi, Mayor Gabriel Campana, and City Clerk Janice Frank and for the production of documents and records regarding all tickets issued in 2015 under the 2015 IPMC, all condemnations in 2015, all inspections reports for 2015, and all re-inspections for utility shut-offs in 2015. The City moved to quash those subpoenas. In its motion to quash, the City asserted that the subpoenas did not comply with Rules 234.2, 4009.21 and 4009.22 of the Pennsylvania Rules of Civil Procedure, the subpoenas were overly broad and unduly burdensome, and the information or testimony sought by Appellant was irrelevant to these proceedings.

Judge Butts quashed the subpoenas because Appellant did not comply with the procedural rules governing their issuance and the proposed testimony of the mayor and city clerk was not relevant to the proceedings in this case. For example, there are Pennsylvania statutes and rules governing the issuance of subpoenas which, among other things, require a check for the witness's compensation and mileage to be mailed with the subpoena. See 42 Pa.C.S. §5903; Pa. R. Civ. P. 234.2. Appellant admitted that he failed to submit the required compensation for the witnesses when he sent the subpoenas, because he "didn't think that

city employees were entitled that." N.T., March 21, 2016, at 7. Furthermore, throughout these proceedings the City readily admitted that it did not pass an ordinance to specifically adopt the 2015 IPMC. Instead, it adopted an ordinance in 2004, which adopted the 2003 IPMC and all subsequent editions. The mayor and city clerk in 2004 were Mary Wolf and Diane Ellis, as evidenced by their signatures on Williamsport Exhibit #2. Appellant did not subpoena those individuals; he subpoenaed the current mayor and city clerk, Gabriel Campana and Janice Frank.

Appellant's assertion that he was denied the opportunity to respond to the solicitor's claims before Judge Butts rendered her decision simply is not supported by the record. He had multiple opportunities to state his positions on the record. N.T., March 21, 2016 at 4-8.

Appellant claims the restriction of three hours to try this case was an undue hardship and an additional half day would have eased the burden on him and allowed him to present more details to the court in an organized manner. Although there were a few instances where Appellant had difficulty finding papers that he wished to use in his examination of witnesses or introduce as evidence, the court did not rush Appellant. The court heard any relevant testimony from the witnesses who were present at the hearing and allowed the parties to introduce evidence and exhibits. The court only precluded testimony or witnesses when the court sustained an objection.

Appellant also challenges the sufficiency and weight of the evidence. The City had the burden to prove beyond a reasonable doubt that Appellant allowed occupancy of a condemned and placarded structure. ***Commonwealth v. Nicely***, 988 A.2d 799, 805 (Pa. Commw. 2010). After review of the record for this appeal and upon further reflection, the

court is convinced that it erred in convicting Appellant.

Although the City proved that the electricity at 814 Hepburn Street was shut off at the time Mr. Evansky investigated the complaint on July 27, 2015 and that new tenants occupied the premises as of September 1, 2015 which was before Mr. Evansky returned to the property on September 18, the evidence also showed that the electricity was restored on July 28, 2015, Mr. Setzler contacted codes officers on July 28, 2015 to have the condemnation lifted, and the placard was no longer there when Mr. Setzler showed up at the property. N.T., March 28, 2016, at 68-69, 72. Furthermore, neither Mr. Setzler nor the other property maintenance person who worked for Appellant during that time removed the placard condemning the property. *Id*. at 75.

While Mr. Evansky initially denied that the electricity was restored on July 28, he admitted during cross-examination that the "electricity was turned on the next day." *Id.* at 61. Mr. Evansky's testimony also established that he received a phone message from Mr. Setzler. *Id.* at 45. He returned the call but he could not recall what he said to Mr. Setzler or if he even spoke to him. *Id*. at 44-45.

Mr. Setzler testified that the electricity was restored on July 28. He called Mr. Evansky to notify him that the electricity was on but Mr. Evansky did not call him back. Mr. Setzler also testified that he called and actually spoke to another codes officer, Mr. Kiessling.[3] *Id*. at 68-69.

[3] The court notes that Appellant attempted to have Mr. Setzler testify that during his conversation with Mr. Kiessling, Mr. Setzler asked if the condemnation would be lifted with the electric being back on and Mr. Kiessling said in most cases, yes. The court initially overruled Appellee's hearsay objection, but later sustained the objection and struck that testimony from the record. N.T., March 28, 2016, at 69-71. Although Appellant has not challenged this evidentiary ruling in his appeal, the court believes that it erred in sustaining the objection and striking the testimony. Mr. Kiessling is an employee of the Williamsport Codes Department. *Id*. at 45-46,

Appellant asked Mr. Evansky if Mr. Kiessling spoke to him about Mr. Setzler's phone call. Mr. Evansky testified that Mr. Kiessling mentioned that he had been by the property and Mr. Kiessling may have mentioned that Mr. Setzler called him. *Id*. at 48.

Mr. Evansky, however, never returned to the property to re-inspect it. In fact, when Mr. Evansky returned to the property on September 18, 2015, it was not to re-inspect the premises, but to investigate a complaint that the owner had allowed occupancy. *Id*. at 26. Mr. Evansky also testified that if Mr. Setzler had told him that the electric was on he would verify that it was on. *Id*. at 18.

The court is not criticizing either party. The court does not think that Mr. Evansky was trying to give Appellant a hard time or that Appellant and his representatives were intentionally disregarding or violating the condemnation notice. This situation was more of a break down in communications.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Beau Hoffman, Esquire
John DeRaffele,
305 North Avenue, New Rochelle NY 10801
Work File
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)

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71. The topic of the conversation was a matter within the scope of his employment and while it existed. Therefore, the testimony would not be inadmissible hearsay, but rather within the exception to the hearsay rule for an opposing party's statement. Pa.R.E. 803(25)(D); see also ***Sehl v. Vista Linen Rental Service***, 763 A.2d 858, 861 (Pa. Super. 2000).