

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA HABICH,

Plaintiff-Appellee,

v

CITY OF DEARBORN, JOHN CASCARDO and
JOHN NAGY,

Defendant-Appellant.

UNPUBLISHED

June 19, 2003

No. 235039

Wayne Circuit Court

LC No. 00-035716-AA

Before: Jansen, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Defendants appeal by leave granted from orders reversing a decision of the city of Dearborn Building Board of Appeals (hereinafter “BBA”) and ordering defendants to pay costs and attorney fees in the amount of \$18,202.53, in this case involving a BBA decision not allowing plaintiff to re-occupy her 4770 Firestone, Dearborn, Michigan home until an inspection was made pursuant to Dearborn Code of Ordinances, section 11-42. We reverse and reinstate the BBA’s decision.

Plaintiff owns a two-bedroom house, that has been owned by her family since 1958, at 4770 Firestone, Dearborn, Michigan. The dispute between the parties arose after plaintiff allowed Nicole Fickel and her two children to live in the 4770 Firestone house for a period of approximately nine months to a year. According to defendants, plaintiff was required to obtain a Certificate of Occupancy [hereinafter “C of O”] after Fickel moved from the house. Defendants claimed that plaintiff’s home could not be re-occupied by plaintiff until an inspection was made, any necessary repairs were completed, and a C of O was issued.

In July of 2000, City Inspector John Cascardo, went to plaintiff’s 4770 Firestone home pursuant to a rat complaint and placarded the house when he determined that plaintiff was not occupying the house.¹ Subsequently, plaintiff went to the city of Dearborn, and indicated that she was living at the 4770 Firestone house and that her niece was staying at the house while she was working an out-of-town assignment in Lansing, and the placard was removed. Fickel,

¹ It is noted that rat activity was not found at the 4770 Firestone property.

apparently, moved out of the house with her children over the Labor Day weekend 2000. Plaintiff was not living at the property from October 1999 until September 2000.

On September 5, 2000, plaintiff's 4770 Firestone home was again placarded and padlocked when Fickel moved out. A few weeks later, plaintiff filed a complaint in federal district court asserting a civil rights claim under 42 USC 1983, alleging a violation of her equal protection, due process, and violations of the Michigan State Constitution. Apparently, Federal District Judge John Feikens conducted a hearing in chambers, the following day, to discuss plaintiff's motion for a preliminary injunction, which sought immediate removal of the padlock. Judge Feikens directed the city or the city agreed to conduct a hearing, and the city agreed to remove the padlock from the house until such a hearing.²

The BBA conducted special meetings over the course of three days pursuant to the direction received from the federal court. The special meetings were treated as an appeal by plaintiff from a city of Dearborn determination requiring plaintiff to obtain a C of O to occupy the 4770 Firestone home, and were referred to as such. At the conclusion of the hearing, one of the members moved to deny plaintiff's appeal, "with the understanding that a tenant relationship was developed, whether written or not written, it was implied, and by the owner vacating property created the tenant-owner relationship." All the members supported the motion and plaintiff's appeal was denied.

Following the BBA's determination, apparently, the parties appeared in the federal court, and the federal court declined jurisdiction of the decision rendered by the BBA and instructed plaintiff to pursue an appeal in state court. The federal court further entered a stay until the circuit court resolved the appeal and ordered that the issue of attorney fees be resolved by the circuit court as well.³

Plaintiff filed an appeal of the BBA decision, and a hearing was held on plaintiff's appeal. The circuit court reversed and vacated the BBA's findings. Subsequently, plaintiff filed a motion requesting costs and attorney fees pursuant to MCR 7.101(O) and 42 USC 1988. An order reversing and vacating the BBA's decision was entered and another order was entered, on the same day, awarding plaintiff costs and attorney fees.

Defendants' first issue on appeal is that the circuit court erred and abused its discretion in reversing the BBA's determination that plaintiff's house required a safety inspection by failing to give deference to the BBA's findings of fact and by failing to observe the standard of review. We agree.

Generally an "administrative decision is reviewed by the circuit court to determine whether the decision was authorized by law and supported by competent, material, and substantial evidence on the whole record." *Barak v Oakland Co Drain Comm'r*, 246 Mich App 591, 597; 633 NW2d 489 (2001), quoting *Michigan Ed Ass'n Political Action Committee*

² The record is unclear as to how, but the matter ended up before the BBA for a hearing.

³ On October 18, 2001, Judge Feikens dismissed the claims in federal court.

(*MEAPAC*) v *Secretary of State*, 241 Mich App 432, 443-444; 616 NW2d 234 (2000). “Substantial evidence is any evidence that reasonable minds would accept as adequate to support the decision; it is more than a mere scintilla of evidence but may be less than a preponderance of the evidence.” *Barak, supra*, 246 Mich App 597, quoting *MEAPAC, supra*, 241 Mich App 444.

This Court reviews a lower court's review of an administrative decision to determine “whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings,” which is essentially a “clearly erroneous” standard of review. *Dignan v Mich Pub School Employees Ret Bd*, 253 Mich App 571, 575-576; 659 NW2d 629 (2002) quoting *Boyd v Civil Service Comm*, 220 Mich App 226, 234-235; 559 NW2d 342 (1996).⁴ A finding is clearly erroneous where, after reviewing the record, “this Court is left with the definite and firm conviction that a mistake has been made.” *Dignan, supra*, 253 Mich App 576, quoting *Boyd, supra*, 220 Mich App 235.

Defendants argue that the circuit court erred in reversing a BBA determination requiring plaintiff to obtain a C of O before re-occupying her 4770 Firestone house. The city has two ordinances under its code of ordinances related to housing that are relevant to the dispute. The first ordinance is Dearborn Code of Ordinances, section 11-198, which governs inspections, and provides:

- (a) The director of building and safety, or such other building officials as the director may designate, is hereby authorized to make, and shall make, inspections of income property, occupied or unoccupied, or any other dwelling, except owner-occupied single-family and two-family dwellings, as follows:

* * *

- (2) Upon a change in occupancy if an inspection has not been made within the last three years. . . .

Although the ordinance does not explain the reasons for an inspection or provide any remedy if an owner refuses to allow the inspector to enter, the city of Dearborn claims to have authority to prevent plaintiff from occupying her home until the inspection is conducted and a C of O is issued. The relevant ordinance regarding a C of O is Dearborn Code of Ordinances, section 11-42, which provides:

- (a) It shall be unlawful for any person to occupy or reoccupy or for any owner or agent thereof to permit the occupation or reoccupation of any building or addition thereto, or part thereof, for any purpose, until the building and

⁴ It is noted that plaintiff contends that this was not an “agency” decision because it was not a state agency. However, this same standard of review has applied in several cases involving municipal agencies and boards, and these administrative municipal boards are referred to as “agency.” See *Grant v Meridian Charter Twp*, 250 Mich App 13, 18; 645 NW2d 79 (2002); *Murphy v Oakland Co Dep’t of Health*, 95 Mich App 337, 340; 290 NW2d 139 (1980).

safety department has issued a certificate of occupancy. The certificate of occupancy so issued shall state that the occupancy complies with all the provisions of this article, as amended. This section shall not apply to any occupancy in existence as of November 4, 1981.

The city of Dearborn claimed and the BBA agreed that plaintiff's home could not be re-occupied by plaintiff until an inspection was made, any necessary repairs were completed, and a C of O was issued. The BBA decided that there was at least an implied landlord/tenant relationship between Fickel and plaintiff, plaintiff had vacated the property, and thus, determined that the 4770 Firestone home should not be re-occupied by plaintiff until an inspection was made pursuant to Dearborn Code of Ordinances, section 11-42.

The circuit court's function is to ascertain if there was competent, material and substantial evidence upon the whole record which the BBA decision could be based. MCR 7.105(M) provides:

On completing review the court shall enter a written order. The court may affirm, reverse, remand, or modify the decision of the agency and may grant the petitioner or the respondent further relief as appropriate based on the record, findings, and conclusions. When the court finds that the decision or order of an agency is not supported by competent, material, and substantial evidence on the whole record, the court shall separately state which finding or findings of the agency are so affected. When the court finds that a decision or order of an agency violates the constitution or a statute, is affected by a material error of law, or is affected by unlawful procedure resulting in material prejudice to a party, the court shall state its findings of fact and conclusions of law and the reasons for its conclusions, and identify those conclusions of law of the agency, if any, that are being reversed.

In this case, the circuit court, in reversing and vacating the BBA decision, only stated the following reasoning:

The Court has had an opportunity to read the appeal and the responses and has perused this folder on the 15th which is enclosed a proof filing of the transcript. And I have read all of this. The Court has heard argument here today, response and rebuttal, and that Court is satisfied that as far as this matter is concerned that the Court will reverse and vacate the finding of the Building Board of Appeals and the Court will sign an order to that effect. Thank you.

The circuit court on the record failed to articulate any reasons why it was reversing the BBA decision. The circuit court did not, specifically, mention whether the BBA's decision "was authorized by law and supported by competent, material, and substantial evidence on the whole record," and did not make the findings it was required to make pursuant to MCR 7.105(M). *Barak, supra*, 246 Mich App 597; MCR 7.105(M). Thus, there is no record as to whether the circuit court applied correct legal principles. *Dignan, supra*, 253 Mich 575-576; *Grant, supra*, 250 Mich App 18-19. Therefore, the circuit court violated MCR 7.105(M) for lack of specificity. This Court may review administrative decisions the same as the circuit court to determine whether the decision was authorized by law and was supported by competent,

material, and substantial evidence. *Oakland Co Probate Court v Dep't of Social Services*, 208 Mich App 664, 666; 528 NW2d 215 (1995).

There was competent, material, and substantial evidence to support the BBA's decision that there was an implied landlord/tenant relationship between plaintiff and Fickel and that plaintiff no longer occupied the property while Fickel was there. The record developed at the BBA hearings contained sufficient evidence to support the BBA's conclusions and final decision. Plaintiff was not living at the 4770 Firestone property from approximately October 1999 until September 2000. Cascardo had heard that plaintiff was living on Rosalie Street with her son and had seen her at the Rosalie property. Plaintiff explained that she accepted a job as a live-in caregiver in Lansing and was initially living there with her sister, but then she had a heart attack and returned in July 2000. Upon returning from Lansing, because Fickel had cats and plaintiff was allergic to them, she stayed at her son's house on Rosalie Street until Fickel moved out. Plaintiff denied Fickel paid rent, but acknowledged that that Fickel gave her some money "towards some bills," and that she told Fickel "whatever she had, that's fine." Plaintiff later stated that Fickel "helped pay" the telephone, gas, electric and cable bills. Plaintiff also acknowledged that Fickel gave her money beyond the utility bills, "just about three times is all." Fickel stated that she gave plaintiff some money, including about "\$1,600, 2,000," that did not include money for utilities. According to Fickel, plaintiff would telephone her in advance before coming over to the house, evidencing that Fickel had exclusive control of the property. There was evidence that plaintiff had moved out, and Fickel, an unrelated person, moved in and was paying what could be considered rent.⁵

Although, there was also substantial evidence that a landlord/tenant relationship was not created and plaintiff never gave up occupancy, when there is sufficient evidence to support the administrative tribunal's determination, a reviewing court must not substitute its discretion for that of the administrative tribunal even if the court might have reached a different result. *Black v DSS*, 195 Mich App 27, 30; 489 NW2d 493 (1992). It does not matter that alternative findings also could have been supported by substantial evidence on the record. *In re Payne*, 444 Mich 679, 692 (Boyle, J.), 698 (Riley, J.); 514 NW2d 121 (1994).

Additionally, the BBA's decision, apparently, was authorized by law. Dearborn Code of Ordinances, section 11-198 appears to allow inspection of income property or a dwelling that is not occupied by the owner when there is a change in occupancy and an inspection has not occurred in three years. Specifically, the director of building and safety is authorized "to make, and shall make, inspections of income property, occupied or unoccupied, or any other dwelling, except owner-occupied single-family . . . [u]pon a change in occupancy if an inspection has not

⁵ Plaintiff argued that there was no substantial evidence because the evidence relied on was largely hearsay. However, there was substantial non-hearsay evidence from plaintiff, Fickel, and Cascardo to support the BBA determination. Plaintiff also argues on appeal she must have abandoned the property in order for the city of Dearborn to be able to inspect for a C of O. There was competent evidence upon which the BBA could find that the right to occupy without a C of O was abandoned when plaintiff moved out and a landlord/tenant relationship was entered into. Apparently, the BBA did find that plaintiff abandoned use of the home as her primary residence as it found she vacated the property and intended to create a landlord/tenant relationship.

been made within the last three years.” The BBA determined that there was an implied landlord/tenant relationship, that plaintiff vacated the property, and therefore, plaintiff should not be permitted to re-occupy the premise until an inspection is conducted pursuant to Dearborn Code of Ordinances, section 11-42. Thus, the BBA made the finding that an inspection for a C of O was required because the 4770 Firestone property was rental property and there was a change of occupancy. The city of Dearborn was directed to have a hearing on this matter by the federal court. There is nothing to suggest that the BBA determination was not authorized by law.⁶

There was substantial evidence that reasonable minds would accept as adequate to support the BBA decision. *Barak, supra*, 246 Mich App 597. A review of the whole record supports that the BBA decision was supported by competent, material and substantial evidence and is authorized by law. Therefore, we reverse the circuit court’s order reversing and vacating the BBA decision, and reinstate the BBA’s ruling.

Defendant’s final issue on appeal is that the circuit court erred in awarding costs and attorney fees in an appeal from the BBA where there exists no statutory authority to award costs or attorney fees. We agree.

This Court reviews the findings of fact underlying an award of attorney fees for clear error, *Solution Source, Inc v LPR Associates Ltd Partnership*, 252 Mich App 368, 381; 652 NW2d 474 (2002), while the decision whether to award attorney fees and the determination of the reasonableness of the fees are within the trial court’s discretion and will be reviewed on appeal for an abuse of discretion, *Phinney v Perlmutter*, 222 Mich App 513, 560; 564 NW2d 532 (1997); *Jordan v Transnational Motors, Inc*, 212 Mich App 94, 97; 537 NW2d 471 (1995). This Court reviews an award of costs for an abuse of discretion. *Kernen v Homestead Dev Co*, 252 Mich App 689, 691; 653 NW2d 634 (2002). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made. *Solution Source, Inc, supra*, 252 Mich App 381-382. An abuse of discretion occurs when the decision was so violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or an exercise of passion or bias, *Bean v Directions Unlimited, Inc*, 462 Mich 24, 34-35; 609 NW2d 567 (2000), or the trial court misapplied or misunderstood the law, *Bynum v ESAB Group, Inc*, 467 Mich 280, 283; 651 NW2d 383 (2002).

Generally, “[a]wards of costs and attorney fees are recoverable only where specifically authorized by a statute, a court rule, or a recognized exception.” *Phinney, supra*, 222 Mich App 560. Plaintiff, apparently, requested attorney fees and costs under 42 USC 1988 and MCR 7.101(O) (based on 42 USC 1988), which allows recovery of costs and attorney fees. Under 42 USC 1988, only a “prevailing party” may recover. As determined, *supra*, the circuit court erred

⁶ We are in no way ruling on the validity of the Dearborn Code of Ordinances, sections 11-42 and 11-198. Nor are we addressing the authority of the BBA in these type of hearings or the fact that neither ordinance provides any measure of enforcement or remedy if the owner refuses. The matter was, apparently, before the BBA based on agreement of the parties or at the direction of the federal court. Thus, our review, pursuant to the appeal, is limited to the validity of the circuit court’s review of the BBA’s determination.

in reversing and vacating the BBA decision, and thus, plaintiff is not the prevailing party. Therefore, the award of costs and attorney fees should be reversed.

Reversed.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly
/s/ Karen Fort Hood