

STATE OF MICHIGAN
COURT OF APPEALS

CITY OF CHEBOYGAN,

Plaintiff-Appellee,

v

RICHARD W. HAVENS,

Defendant-Appellant.

UNPUBLISHED
November 8, 2002

No. 231946
Cheboygan Circuit Court
LC No. 00-006669-CH

Before: Hood, P.J., and Whitbeck, C.J., and O'Connell, J.

PER CURIAM.

Defendant appeals as of right a trial court order permitting plaintiff to raze as a nuisance a house and remove debris from an adjacent lot, both owned by defendant. The order required defendant to clear the structure and debris within thirty days, or the city could remove the structure and debris and have a lien and enforcement rights on the premises for the cost of removal. We affirm.

Defendant first argues that the present action was initiated without providing him with notice or an opportunity to cure the violations, thereby violating his right to due process. We disagree.

Whether a party has been afforded due process is a question of law subject to de novo review on appeal. *In re Carey*, 241 Mich App 222, 225-226; 615 NW2d 742 (2000). Generally, an individual whose rights might be affected by litigation is entitled to notice and a reasonable opportunity to appear and defend his interests sufficient to satisfy the constitutional requirements of due process. US Const, Am V, XIV § 1; Const 1963, art I, § 17; see *In re Juvenile Commitment Cost*, 240 Mich App 420, 440; 613 NW2d 348 (2000). To satisfy due process, notice must be reasonably calculated to apprise interested parties of the pendency of the action and must afford them an opportunity to present objections. *Dusenbery v United States*, 534 US 161, ___; 122 S Ct 694, 700; 151 L Ed 2d 597 (2002); *Vincencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 504; 536 NW2d 280 (1995). Actual receipt of notice is not required. *Dusenbery, supra*, 122 S Ct at 700.

Regarding the court action, plaintiff was given adequate notice and an opportunity to be heard before an impartial arbiter. First, before the initiation of adversarial proceedings, defendant was verbally notified of the breach and given an opportunity to rectify the nuisance.

Any failure of notice was because defendant failed to take appropriate steps to properly retrieve his messages. Second, once formal proceedings were initiated, defendant was served process by registered mail demanding summary abatement of several nuisances existing on his property. This provided notice of the impending action as prescribed by the court rules and allowed the court to acquire jurisdiction over defendant so that he could properly be brought into court. MCR 2.105(A)(2); see also *De Kuyper v De Kuyper*, 365 Mich 487, 490; 113 NW2d 804 (1962); *Grenawalt v Nyhuis*, 335 Mich 76, 82; 55 NW2d 736 (1952).

Once commenced, defendant vigorously litigated the instant action as exemplified by his answer and counterclaim, various motions before, during, and after the proceedings, and his active participation at trial. The record further reveals that while defendant might have obfuscated his defense because of inadequate knowledge of legal procedure and his decision to act in propria persona, he actively participated in the proceedings by tendering evidence and cross-examining witnesses. In total, defendant was apprised of the pendency of the action and was provided with an opportunity to be heard and present objections sufficient to satisfy the requirements of due process. *Dusenbery, supra*, 122 S Ct at 700; *Vincencio, supra* at 504.

Defendant next raises a suppression of evidence challenge, arguing the trial court should have excluded evidence of the condition of the *inside* of his house, obtained without a valid warrant by the director of public safety. We disagree.

To the extent that defendant failed to object to the introduction of the evidence, this Court's review is for plain error. *Kern v Blethen-Coluni*, 240 Mich App 333, 335-336; 612 NW2d 838 (2000). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e. clear or obvious, 3) and the plain error affected substantial rights." *Id.*, quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Here, defendant has failed to demonstrate that the challenged testimony affected his substantial rights. Without reaching the question of whether the director of public safety's search was valid, we note that the evidence *was excluded* from the pleadings at trial. Plaintiff moved to have the action, originally brought under the BOCA (Building Code of America), amended to conform with the proofs and proceed under Cheboygan City Ordinance 21.052, which prohibits blighted structures or buildings that display three or more prohibited conditions. In defendant's case, those conditions were the deteriorating roof, damaged siding, broken windows, collapsing porch, and a broken foundation – each constituting a violation. These violations were in plain view of the director of public safety regardless of his inspection of the interior. Essentially, any evidence "searched and seized" from defendant's house was irrelevant to the action under ordinance 21.052, so the failure to suppress did not affect the outcome of the action. Regardless of the state of the interior, competent evidence was adduced that would allow a factfinder to enjoin defendant from continuing the nuisance. Moreover, the judge, acting as the factfinder, possessed an understanding of the law which allowed him to ignore evidentiary errors and decide the case based solely on properly admitted evidence. *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001).

Defendant's final argument on appeal alleges the charged violations constituted "repairable offenses" and he should have been given an opportunity to effect repairs before

condemnation proceedings. He further argues that the charging ordinance does not provide authority to order the demolition and sale of the property. We disagree.

Generally, a property owner's right to the unrestricted use of his property is subject to reasonable regulation by the state in the legitimate exercise of its police powers to enact laws protecting health, safety, welfare, and public morals. *Woodland v Michigan Citizens Lobby*, 423 Mich 188, 201; 378 NW2d 337 (1985); see also *Gora v City of Ferndale*, 456 Mich 704; 576 NW2d 141 (1998). A court sitting in equity has the power to enjoin a nuisance, but, as a matter of policy, will attempt to tailor the remedy to the problem and, where possible, to abate the nuisance without completely destroying the legitimate activity. *Eyde Bros Development Co v Roscommon Co Bd of Road Comm'rs*, 161 Mich App 654, 670; 411 NW2d 814 (1987). Here, the court action was precipitated by violations of ordinance 21.052 and, accordingly, its statutory language must be examined to determine whether it provides authority for the court's order. The traditional rules of statutory construction apply to the interpretation of municipal ordinances. *Gora, supra* at 711.

In the case at bar, defendant was in violation of City of Cheboygan Ordinance Chapter 105, § 21.052. Chapter 105 states that violations of the chapter "shall" be considered a civil infraction, punishable by a fine. Cheboygan Ordinance § 21.060. At first blush, this seems to render the provisions of the court order invalid. However, the proper analytical framework is based on the position that the ordinance acts only as a limitation on the city's enforcement powers in an action brought in district court. The Home Rule Cities Act limits the regulatory authority of the cities as effected through their ordinances to fines and imprisonment, in most cases not exceeding ninety-three days. MCL 117.4i(k); see also MCL 117.4l.

Accordingly, violations requiring more drastic action are brought in circuit court. The present action was brought in circuit court and specifically sought to have defendant's properties declared a public nuisance under §§ 21.058 and 21.059 of the Cheboygan City Code. Chapter 15 of the City of Cheboygan Ordinance provides under certain circumstances for action for abatement to be brought in circuit court. Cheboygan Ordinance § 21.058(4). While § 21.058(4) was not the ordinance that defendant was charged under, it is in pari materia because they relate to the same subject, share a common purpose, and must be read together as one law, even if they contain no reference to one another and were enacted on different dates. *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998). Accordingly, the trial court possessed the jurisdiction to consider plaintiff's nuisance claim; on finding a public nuisance, the remedies under MCL 600.2940 became available. See 58 Am Jur 2d, Nuisances § 355, p 947 ("Trial courts have broad discretion in fashioning appropriate remedies to abate public nuisances.").

Under MCL 600.2940, equitable jurisdiction is conferred and the case is brought within the ambit of the remedies available to a litigant in circuit court. MCL 600.2940(1) and (5). The circuit court is also empowered to order the nuisance abated by defendant, and failing to do so, by plaintiff. MCL 600.2940(2) and (3). The expenses incurred by abatement are to be collected "in the same manner as damages and costs are collected upon execution . . . in like manner as goods are sold on execution for the payment of debts." MCL 600.2940(4); see also *Cheybogan Co Construction Code Dep't v Burke*, 148 Mich App 56, 59; 384 NW2d 77 (1985). Likewise, "[e]quity may deal with property used in maintaining a nuisance in any way reasonably necessary to suppress the nuisance. Thus a court of equity may direct that a structure which constitutes a nuisance be abated unless such changes as will obviate the objection are made

within a specified time.” 58 Am Jur 2d, Nuisances, § 358, p 949.

We conclude that a demolition order was appropriate in this case. In *Charter Twp of Orion v Burnac*, 171 Mich App 450, 453; 431 NW2d 225 (1988), a panel of this Court upheld the lower court’s grant of an order allowing demolition of an apartment complex as a means of abating a nuisance. The buildings were described as not salvageable due to deteriorating foundations and not useable in their current condition. The situation was generally described as one in which it was “cheaper to start over.” *Id.* at 454-455. The Court found the demolition order appropriate where the defendant was given an opportunity to cure the potential dangers but failed to do so by making court ordered repairs. *Id.* at 462.

Similarly, defendant’s house in question was in a state of disrepair, and the director of public safety testified that the building was not in a salvageable condition. This opinion was based on an estimate that the cost to rehabilitate would far exceed the cost of the building and defendant’s financial resources, based on his past performance. Moreover, there was some concern that the building would eventually collapse due to the deteriorating foundation. To his credit, defendant was attempting to rehabilitate the premises, but from the record, his efforts do not seem comprehensive, and were untimely and futile. Because the trial court’s findings were made based on its personal observation of the cited premises, photographs, testimony from the director of public safety of the threat to public safety and health, and defendant’s failure to comply with court ordered repairs, this Court cannot conclude that a mistake was made in ordering the house demolished, the debris removed, and charges levied against defendant. See *id.* at 453; *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001).

Affirmed.

/s/ Harold Hood
/s/ William C. Whitbeck
/s/ Peter D. O’Connell