NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 1470

CITY OF BATON ROUGE/PARISH OF EAST BATON ROUGE

VERSUS

CHARLIE DAVIDSON

Judgment Rendered: May 4, 2007

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Appealed from the
Nineteenth Judicial District Court,
in and for the Parish of East Baton Rouge,
State of Louisiana
Docket Number 541,312

Honorable Curtis Calloway, Judge Presiding

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BEFORE: CARTER, C.J., WHIPPLE, AND McDONALD, JJ.

WHIPPLE, J.

This matter is before us on appeal by defendant/appellant, Charlie Davidson,[1] from a judgment of the trial court granting a petition for preliminary injunction filed by plaintiff, the City of Baton Rouge/Parish of East Baton Rouge ("the City/Parish").

FACTS AND PROCEDURAL HISTORY

On March 10, 2006, the City/Parish filed a petition for preliminary and permanent injunction contending that appellant, the owner and occupant of a certain piece of property located at 2861 Brightside Lane in Arlington Place Subdivision in the Parish of East Baton Rouge, was operating a business in an A-1 Zone[2] in violation of Title 7, Chapter 8, Section 8.201 of the Unified Development Code, specifically, Appendix H, entitled, "Permissible Uses of the City of Baton Rouge and Parish of East Baton Rouge." In addition, the City/Parish filed a memorandum in support of the petition to which it attached a copy of Title 7, Chapter 8, Section 8.201, which sets forth the purpose and use for A-1 zoned properties, and also attached Appendix H, which sets forth permissible uses for the A-1 Single Family Residential District.

After a hearing on May 8, 2006, the trial court granted the City/Parish's request for preliminary injunction, based upon its finding that appellant was, in fact, operating a business in an A-1 Zone in violation of the applicable zoning regulations above. A judgment was signed on May 23, 2006.

Appellant lodged the instant suspensive appeal, contending that the injunction was improperly issued because: (1) the City/Parish failed to prove that the property at issue herein was zoned A-1; (2) the City/Parish failed to

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[1]Although the City/Parish's petition shows appellant's last name as Davidson," appellant's counsel identifies defendant as "Davison" in the pleadings and briefs to this court.

[2]According to Section 8.201, Zone A1 is a Single Family Residential District.

properly obtain judicial cognizance of the Unified Development Code; and (3) the trial court's finding that appellant was operating a business from his home was manifestly erroneous and clearly wrong.

ASSIGNMENT OF ERROR NUMBER ONE

In this assignment, appellant contends that the City/Parish failed to establish that the property at issue herein was, in fact, zoned A-1. At the hearing, the City/Parish attempted to introduce an affidavit from Chris Cleland, a representative of the Planning Commission, which states that the zone designation for appellant's property is A-1. Counsel for appellant objected to the introduction of Cleland's affidavit on the basis that it was an out-of-court statement by a declarant being offered to prove the truth of the matter asserted, i.e., the zoning classification of the property, and that as such, the affidavit constituted hearsay. The trial court sustained the objection, ruling that Cleland's affidavit testimony was inadmissible hearsay. However, the trial court allowed counsel for the City/Parish to proffer the affidavit. Although the transcript shows that counsel for the City/Parish stated more than once that she could call Cleland to appear before the trial court to testify as to the zoning designation of the property, she did not call Cleland.

"Hearsay" is defined in LSA-C.E. art. 801 as a statement, other than one made by the declarant while testifying at the present trial or hearing, offered to prove the truth of the matter asserted. Generally, hearsay is not admissible except as provided by the Code of Evidence or other legislation. LSA-C.E. art. 802. The recognized exceptions to the "hearsay" rule are set forth in LSA-C.E. art. 803.

Appellant argues that aside from the failed attempt to introduce Cleland's affidavit, the City/Parish made no effort to establish the zoning designation of the property. Appellant argues that because the particular

zoning designation was not established by any admissible evidence, the City/Parish did not meet its burden of proving that appellant was in violation of any specific zoning requirements. Appellant further notes that the City/Parish did not prove, or even argue, that Cleland's affidavit fit within any of the well-established statutory exceptions to the hearsay rule. See LSA-C.E. art. 803.

The City/Parish counters on appeal that "[s]ince the only record evidence of zoning came from [Cleland's] affidavit, it must be presumed that the district court changed its decision regarding the admissibility of the affidavit." The City/Parish then argues that pursuant to LSA-C.C.P. art. 3609, which permits the trial court to hear applications for preliminary injunctions upon the verified pleadings or affidavits and sets forth the procedure to do so, Cleland's affidavit is admissible.

However, we first observe that there is nothing in the record to show, with any specificity, that the trial court changed its ruling on the admissibility of Cleland's affidavit. More importantly, we find no basis for admissibility of the affidavit under the particular circumstances herein.

Louisiana Code of Civil Procedure article 3609, entitled "Proof at hearings; affidavits," provides as follows:

> The court may hear an application for a preliminary injunction or for the dissolution or modification of a temporary restraining order or a preliminary injunction upon the verified pleadings or supporting affidavits, or may take proof as in ordinary cases. **If the application is to be heard upon affidavits, the court shall so order in writing, and a copy of the order shall be served upon the defendant at the time the notice of hearing is served.**
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> **At least twenty-four hours before the hearing, or such shorter time as the court may order, the applicant shall deliver copies of his supporting affidavits to the adverse party, who shall deliver to the applicant prior to the hearing copies of affidavits intended to be used by such adverse party.** The court, in its discretion, and upon such conditions as

> it may prescribe, may permit additional affidavits to be filed at or after the hearing, and may further regulate the proceeding as justice may require.

(Emphasis added.)

While we agree that LSA-C.C.P. art. 3609 provides that affidavits may constitute proper evidence in a preliminary injunction case in some circumstances, the record does not reflect any compliance with the provisions of LSA-C.C.P. art. 3609 prior to the hearing. Specifically, there is nothing in the record to indicate that the trial court issued an order notifying the parties in writing that the hearing would be conducted upon affidavits, or that service of such order upon the defendant occurred at the time the notice of the hearing was served. Moreover, there is nothing to show that the City/Parish complied with the provisions of the statute requiring delivery of copies of supporting affidavits to the adverse party at least twenty-four hours before the hearing.

In conceding that the proper procedures for proceeding upon proof by affidavits were not followed, the City/Parish counters that the judgment should be affirmed inasmuch as appellant has not been prejudiced in any way by allowing the City/Parish to prove the zoning of the property by affidavit as opposed to testimony from a live witness. In support, the City/Parish relies on Louisiana State Board of Medical Examiners v. Mooring, 234 So. 2d 63 (La. App. 1st Cir. 1970). In that case, a preliminary injunction was granted, restraining the defendant doctor from practicing medicine until he complied with the provisions of the Louisiana Medical Practice Act. The defendant complained that the use of verified pleadings and affidavits at the hearing deprived him of a full trial on the merits. He further complained that he was not served with a copy of the trial court's order as required by LSA-C.C.P. art. 3609, nor provided with copies of the affidavits twenty-four hours before the hearing. On review, this court determined that service of a copy of the trial

court's order was insignificant where the trial judge's handwritten order to limit proof to verified pleadings and affidavits was signed in the presence of defendant's counsel, thus putting the defendant on notice that the hearing would be conducted upon the verified pleadings and affidavits pursuant to the provisions of LSA-C.C.P. art. 3609. Further, the defendant therein was fully apprised by the petition of the names of persons alleged to have been treated by him and the dates and kind of treatment, which was the substance of the supporting affidavits. Moreover, defendant did not claim that he was at a disadvantage by not having seen the allegations in affidavit form. Thus, the defendant was clearly in a position to have prepared counter-affidavits. Louisiana State Board of Medical Examiners v. Mooring, 234 So. 2d at 65.

On review, we find the Louisiana State Board of Medical Examiners case distinguishable from the instant case, where the City/Parish has failed to comply with any of the requirements set forth in LSA-C.C.P. art. 3609.[3] Unlike the mover in Louisiana State Board of Medical Examiners, the City/Parish failed to invoke the provisions of LSA-C.C.P. art. 3609. Moreover, as noted above, in Louisiana State Board of Medical Examiners, the trial judge had prepared a handwritten order specifically limiting proof to verified pleadings and affidavits, which order was signed in the presence of defendant's counsel, thus putting defendant on notice that the hearing would be conducted upon affidavits pursuant to the provisions of LSA-C.C.P. art. 3609.

In the instant case, no order was requested (or issued) setting forth that proof would be received by affidavits. Hence, we are unable to say that

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[3]We note that after thorough review of the record, particularly the City/Parish's Petition for Preliminary and Permanent Injunction, we are unable to find where the City/Parish requested a hearing in accordance with the provisions of LSA-C.C.P. art. 3609.

appellant was put on notice that the hearing would be conducted upon affidavits. Given defendant's objection and the procedural posture of the case, we must agree that the affidavit was inadmissible.

Thus, because the City/Parish failed to establish that the property at issue herein was zoned A-1, we are constrained to conclude that the trial court erred in granting the petition for a preliminary injunction on the basis that appellant violated zoning provisions applicable to property located in an A-1 Zone, absent proof that the property in question was zoned A-1. Accordingly, we must vacate the judgment of the trial court granting the petition for preliminary injunction and remand for further proceedings.[4]

CONCLUSION

For the above and foregoing reasons, the judgment is vacated and the matter remanded for further proceedings. Costs of this appeal are assessed one-half each to the parties.

VACATED AND REMANDED.

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[4]While we pretermit appellant's other assignments of error, we observe that the other evidence, properly admitted, appears to support a finding that appellant was operating a business from the property in question. However, because we find that a remand is appropriate, we decline to review the merits of the remaining assignment of error, which can be re-urged by appellant in appellant's subsequent appeal, if any.