2016 IL App (1st) 140686-U

FIFTH DIVISION
OCTOBER 28, 2016

No. 1-14-0686

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| 7355 SOUTH SHORE DRIVE CONDOMINIUM ASSOCIATION and SHELLEY NORTON,<br><br>Plaintiffs-Appellants, | ) | Appeal from the Circuit Court of Cook County. |
| v. | ) | No. 12 CH 28329 |
| THE CITY OF CHICAGO COMMISSION ON HUMAN RELATIONS, PAT GILBERT and VERNITA GRAY,<br><br>Defendants-Appellees. | ) | Honorable Franklin U. Valderrama, Judge Presiding. |

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PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

**O R D E R**

¶ 1 *Held*: The judgment of the circuit court of Cook County affirming the final administrative decision of the City of Chicago's Commission on Human Relations is confirmed over respondents' contention that they were denied their right to due process because the final recommended decision was issued by a hearing officer who did not preside over the administrative hearing. Complainants were entitled to attorney fees and the Commission did not abuse its discretion in awarding the fees.

¶ 2 Respondents, 7355 South Shore Drive Condominium Association (Association) and Shelley Norton, appeal from a circuit court order affirming the ruling of the City of Chicago's Commission on Human Relations (Commission), which found that respondents violated the Chicago Fair Housing Ordinance (Ordinance) (Chicago Municipal Code § 5-8-030 (amended Dec. 21, 1988)) and ordered: (1) respondents to pay complainants, Pat Gilbert and Vernita Gray, $100 and $2,000, respectively, in compensatory damages; (2) the Association to pay a $500 fine for each of the two violations, for a total of $1,000; (3) Norton to pay a $100 fine for each of the two violations, for a total of $200; and (4) respondents to pay $68,189.05 in complainants' attorney fees.

¶ 3 On appeal, respondents contend that their right to due process was violated because the final recommended decision was issued by a hearing officer who did not preside over the administrative hearing. Respondents also contend that, in light of complainants' limited success and the "nominal" damages awarded, they were not entitled to such disproportionate attorney fees. We affirm.

¶ 4 On March 9, 2001, Gilbert filed a complaint with the Commission against the Association and its board president, Norton, for discrimination on the basis of race (white) and sexual orientation (lesbian) in violation of the Ordinance. In the complaint, Gilbert alleged that respondents prevented her from purchasing a unit in the building on two separate occasions. First, in April 2000, respondents failed to provide an assessment letter that was required for closing on the purchase of the unit. Second, in September 2000, respondents prevented the sale of the unit by refusing to approve Gilbert as a purchaser.

¶ 5 On March 30, 2001, Vernita Gray, Gilbert's then-girlfriend, filed a complaint against the Association and Norton for discrimination on the basis of sexual orientation in violation of a City

of Chicago Ordinance. Gray alleged that Norton made anti-gay comments that created a hostile living environment and that she was evicted due to her sexual orientation. Gray filed an amended complaint on November 16, 2001, alleging retaliation from Norton and the Association for filing her initial complaint.

¶ 6 After finding substantial evidence of discrimination, the Commission consolidated the two actions and set them for an evidentiary hearing. The administrative hearing was held on six dates from January 9, 2007, through March 26, 2007, before hearing officer David Youngerman. The record on appeal does not contain a transcript of the hearing. However, the record indicates that 10 witnesses, including Gilbert, Gray and Norton, testified at the hearing. Due to health reasons, hearing officer Youngerman did not issue a recommended ruling for more than three years following the hearing.

¶ 7 On July 2, 2010, the Commission entered an administrative order directing Youngerman to issue a recommended ruling no later than August 2, 2010. In the order, the Commission stated that, if such recommended ruling was not received by August 6, 2010, it was contemplating discharging Youngerman and appointing a new hearing officer. The Commission advised the parties that the appointment of a new hearing officer raises the issue of how witness credibility would be assessed and decided. The Commission also advised the parties that they could stipulate that the new hearing officer decide the case, including any credibility determinations, based solely on the written record. In the alternative, if the parties were unable to so stipulate, a new hearing could be held. The Commission instructed each party to file a position statement addressing this issue.

¶ 8 After Youngerman failed to issue a recommended ruling by August 6, 2010, the parties filed their position statements. Complainants urged the Commission to resolve the matter on the

existing record without further delay and did not object to a new hearing officer issuing a recommended ruling based solely upon the written record. Respondents urged the Commission to compel Youngerman to issue a recommended ruling and objected to a new hearing officer being appointed on the grounds of inefficiency. In the event a new hearing officer was appointed, respondents objected to a new administrative hearing as follows:

> "Respondents most fervently and critically object to a new hearing. The question of a new hearing is beyond the respondents' scope of rational decision-making. It is too extreme, too exhausting and too stressful, and being that urgency is the order of the day, it would not be an expeditious way to handle this matter. Respondents know that a new hearing would be extremely costly as representative of the costs that it has already spent in the initial hearing."
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> A new hearing would be most critically extreme and most detrimental to the survival of the respondents' Condominium. It is financially incapable of spending more on this ongoing debacle."

¶ 9 Respondents also requested that the new hearing officer consult with Youngerman about his impressions of witness demeanor and credibility.

¶ 10 On September 14, 2010, the Commission entered an order discharging Youngerman and appointing a new hearing officer, Martin H. Malin. In the order, the Commission reiterated the position of each party as expressed in their statements. The Commission advised the parties that Malin would have access to the full hearing record in this case and other materials that were available to Youngerman. As a result, the Commission explained that the advocacy of respondents' former counsel would be reflected in the record and not lost to them. However, because respondents did not provide legal authority to support their suggestion that Malin

consult with Youngerman regarding his observations of the demeanor of witnesses, the Commission left it to Malin's discretion to determine whether that option was permissible or practical. The Commission recognized that both parties opposed a new hearing and left it to Malin's discretion to determine whether it was necessary to rehear any testimony. Neither party objected to the Commission's order.

¶ 11 On February 4, 2011, Malin issued a first recommended decision. Malin concluded that it was not necessary to rehear testimony from witnesses or consult with Youngerman regarding his observation of witness demeanor. In reaching this conclusion, Malin stated that consultation with Youngerman or rehearing any of the original testimony would not likely shed any useful light on the underlying issues given that it had been more than three years since the hearing. Malin then made his findings of fact, conclusions of law and recommendations to the Commission.

¶ 12 Malin found that, in September 2000, Norton prevented Gilbert from moving into the building because she did not want "the gay lifestyle in the building." As such, Malin recommended that the Commission find in favor of Gilbert with respect to her claim of sexual orientation discrimination based on respondents' September 2000 refusal to approve Gilbert as a purchaser of a unit in the building. Malin also found that Norton made derogatory comments that created an offensive housing environment for Gray in violation of the Ordinance and recommended that the Commission find in favor of Gray with respect to her claim of sexual orientation discrimination. Malin further recommended that the Commission find in favor of respondents with respect to complainants' other claims of discrimination and retaliation. Finally, Malin recommended that the Commission award Gilbert nominal damages of $1 and Gray compensatory damages of $2,000. Malin also recommended that the Commission impose a

$1,000 fine on Norton and a $200 fine on the Association and award Gray and Gilbert attorney fees because they were the prevailing parties.

¶ 13 Both parties filed objections to the decision. In their objection, respondents argued, *inter alia*, that they were denied due process when Malin issued his recommended decision without having presided at the original hearing and observed the witnesses' demeanor during testimony. In their objection, complainants challenged Malin's reasoning regarding their discrimination claim and the damages awarded.

¶ 14 On June 24, 2011, Malin issued his final recommended decision, adopting his initial findings of fact. In issuing the final decision, Malin stated that he considered the objections of both parties. With regard to respondents' due process claim, Malin explained in detail his reasoning for not consulting with Youngerman or rehearing any testimony, and how he arrived at his credibility determinations.

¶ 15 On July 20, 2011, the Commission issued a final ruling on liability and relief, in favor of complainants, finding that respondents violated the Ordinance. In doing so, the Commission substantively adopted Malin's final recommended decision. The Commission found Malin's decision "prudent and reasonable," and that his credibility assessments were not against the manifest weight of the evidence. The Commission increased Gilbert's emotional distress damages from $1 to $100. The Commission ordered: (1) the Association and Norton to pay Gilbert $100 in compensatory damages; (2) the Association and Norton to pay Gray $2,000 in compensatory damages; (3) the Association to pay a $500 fine for each of the two violations, for a total of $1,000; (4) Norton to pay a $100 fine for each of the two violations, for a total of $200; and (5) the Association and Norton to pay complainants' reasonable attorney fees and associated costs because they were the prevailing parties with respect to their claims of sexual orientation

discrimination. The Commission directed complainants to file a petition for attorney fees with supporting documentation detailing the costs for which reimbursement was sought.

¶ 16 Complainants filed a petition for attorney fees and attached detailed documentation in support thereof, including affidavits of attorneys associated with the case and time sheets reflecting the work performed. The petition shows that Chicago Lawyers Committee for Civil Rights Under Law, Inc. (CLC), began to represent complainants in May 2006. In September 2006, the law firm of Foley & Lardner LLP (Foley) joined the matter and worked as co-counsel with CLC. Complainants sought a total of $70,053.09 in attorney fees: $45,464.50 for work performed by CLC and $24,588.59 for work performed and costs incurred by Foley. Complainants reduced the fees sought by eliminating the fees associated with Gray's unsuccessful retaliation claim in her second amended complaint and Gilbert's unsuccessful racial discrimination claim. Complainants also noted that Foley and CLC reduced their fees by 80% and 50% respectively.

¶ 17 On June 20, 2012, the Commission issued a final ruling on attorney fees and costs in favor of complainants. The Commission rejected respondents' argument that complainants were not entitled to attorney fees because they were awarded only nominal damages. After finding one mathematical or typographical error and adopting the hearing officer's recommended reduction of $1,864.04, the Commission ordered respondents to pay a total of $68,189.05 in attorney fees and costs, in two allocated payments: (1) $44,564.50 to CLC; and (2) $23,624.55 to Foley.

¶ 18 On July 24, 2012, respondents filed a petition for writ of *certiorari* in the circuit court of Cook County. Respondents argued that their right to due process was violated because they were denied a meaningful administrative hearing. Respondents also argued that, given complainants'

*de minimis* damages award and their failure to prove their discrimination claims, the Commission erred in treating them as prevailing parties and awarding them attorney fees.

¶ 19 On February 8, 2014, the circuit court issued an order affirming the decision of the Commission. In its written order, the court found that respondents were not denied their right to due process of law because the hearing officer who presided over the administrative hearing was not the officer who issued the recommended decision. The court also found that the attorney fees awarded to complainants were reasonable. Respondents appeal.

¶ 20 On review, this court considers the administrative agency's decision and not that of the circuit court. *Powell v. City of Chicago Human Rights Comm'n*, 389 Ill. App. 3d 45, 54 (2009). An agency's findings of fact will not be overturned unless the agency exercised its authority in an arbitrary or capricious manner or its decision is against the manifest weight of the evidence. *Powell*, 389 Ill. App. 3d at 54. We review questions of law, such as whether respondents were denied their right to due process, *de novo*. *Powell*, 389 Ill. App. 3d at 54; *Majid v. Retirement Board of Policemen's Annuity and Benefit Fund of City of Chicago*, 2015 IL App (1st) 132182, ¶ 32.

¶ 21 On appeal, respondents first contend that their right to due process was violated because the final recommended decision was issued by a hearing officer, Malin, who did not preside over the administrative hearing. Respondents argue that Malin was unable to make credibility determinations of the witnesses because he did not see them testify or consult with Youngerman about their demeanor. Respondents maintain that fundamental principles of fairness and due process required the Commission to order a rehearing.

¶ 22 The Commission responds that respondents' due process claim is barred by the doctrine of invited error and waiver because respondents induced the now complained-of error and

acquiesced to the alleged error by failing to make a timely objection. Substantively, the Commission argues that respondents' due process claim fails because they cannot demonstrate prejudice where they did not include the transcript of the hearing in the record on appeal for this court's consideration.

¶ 23 The rule of invited error or acquiescence is a procedural default that is sometimes described as estoppel. *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004). "Simply stated, a party cannot complain of error which that party induced the court to make or to which that party consented." *Swope*, 213 Ill. 2d at 217. The rationale behind this rule is that it would be manifestly unfair to allow a party a second trial on the basis of error which that party injected into the proceedings. *Swope*, 213 Ill. 2d at 217 (citing *McMath v. Katholi*, 191 Ill. 2d 251, 255 (2000) (and cases cited therein)); accord *People v. Segoviano*, 189 Ill. 2d 228, 240-41 (2000). Our supreme court has "viewed cases of acquiescence strictly, finding that a party's 'active participation in the direction of proceedings *** goes beyond mere waiver' such that the traditional exceptions to the waiver rule do not apply." *Swope*, 213 Ill. 2d at 218 (quoting *People v. Villarreal*, 198 Ill. 2d 209, 227 (2001)). In light of this precedent, we choose to first resolve the threshold acquiescence issue before reaching the merits of respondents' due process claim. See *Swope*, 213 Ill. 2d at 218.

¶ 24 Here, prior to appointing a new hearing officer, the Commission instructed the parties to file position statements addressing the issue of whether the new hearing officer should decide the case on the written record or rehear witness testimony. In their position statement, respondents objected to a new hearing officer being appointed on the grounds of inefficiency. However, in the event a new hearing officer was appointed, respondents objected to a new administrative hearing as follows:

> "Respondents most fervently and critically object to a new hearing. The question of a new hearing is beyond the respondents' scope of rational decision-making. It is too extreme, too exhausting and too stressful, and being that urgency is the order of the day, it would not be an expeditious way to handle this matter. Respondents know that a new hearing would be extremely costly as representative of the costs that it has already spent in the initial hearing."
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> A new hearing would be most critically extreme and most detrimental to the survival of the respondents' Condominium. It is financially incapable of spending more on this ongoing debacle."

Respondents, having insisted against a new hearing and having procured a ruling from the Commission in accordance with this view, cannot now insist that the action of the Commission was wrong. See *Swope*, 213 Ill. 2d at 218 (citing *Drainage Commissioners of Drainage District No. 2 v. Drainage Commissioners of Union Drainage District No. 3*, 211 Ill. 328, 331 (1904)). Respondents "may not now attack a procedure to which [they] agreed, even though that acceptance may have been grudging." *Swope*, 213 Ill. 2d at 218. As such, we find that respondents acquiesced in the hearing officer's decision to decide the matter on the written record and may not now complain of this error. Having so found we need not consider respondents' due process claim. See *Swope*, 213 Ill. 2d at 218 (reminding courts to avoid constitutional questions where the case may be decided on other grounds).

¶ 25 Respondents next challenge the attorney fees awarded to complainants. It is within the discretion of the trier of fact to determine the reasonableness of the attorney fees requested, and this court will not reverse the amount of fees awarded absent an abuse of that discretion. *Becovic*

*v. City of Chicago*, 296 Ill. App. 3d 236, 240 (1998) (citing *Raintree Health Care Center v. Illinois Human Rights Comm'n*, 173 Ill. 2d 469, 494 (1996)).

¶ 26 Respondents do not challenge any of the specific work performed or time entries presented by complainants in support of their petition for attorney fees, but rather contend that, in light of complainants' limited success and the nominal damages awarded they were not entitled to such disproportionate attorney fees in the amount of $68,189.05. In setting forth this argument, respondents acknowledge that under section 2-120-510 of the Chicago Municipal Code (Chicago Municipal Code § 2-120-510 (amended July 8, 1998)), the Commission has the power to order relief and award complainants "all or portion of the costs, including reasonable attorney fees, expert witness fees, witness fees and duplicating costs, incurred in pursuing the complaint before the Commission[.]" However, they argue, without citation to authority, that the language of section 2-120-510 is "so broad that it appears that the Commission has unfettered discretion to award a complainant costs and fees regardless of whether and to what degree he or she prevail[ed]." Respondents maintain that this interpretation of the ordinance would lead to absurd results and that we should therefore adopt the reasoning of *Farrar v. Hobby*, 506 U.S. 103 (1992), which held that the degree of a plaintiff's overall success should he considered as a factor in determining the reasonableness of an attorney fee award and that in this case complainants were not entitled to the fees because their victory was *de minimis*.

¶ 27 This court has previously considered and rejected the argument that a $2,000 award is *de minimis*. See *Becovic*, 296 Ill. App. 3d at 240 (even assuming *arguendo* that attorney fees are not awardable where the prevailing party's victory was " 'purely technical or *de minimis*' [citation]," respondent would still not prevail on this issue because a finding of a civil rights violation accompanied by a $2,500 award of compensatory damages and an assessment of a $250 civil

penalty represents more than a " 'purely technical victory' " and a " '*de minimis*' " recovery) and cases cited therein. Similarly, here, the Commission's finding that respondents violated the ordinance and total award of $2,100 to complainants plus fines of $1,200 are not technical victories and *de minimis* recoveries such that attorney fees should not have been awarded.

¶ 28 In the alternative, relying on *Shephard v. Hanley*, 274 Ill. App. 3d 442, 445 (1995), and *Cartwright v. Stamper*, 7 F. 3d 106 (7th Cir. 1993), respondents argue that we should substantively reduce the attorney fees awarded after considering: (1) the difference between the amount sought by the complainants; (2) the significance of the legal issue upon which the complainants prevailed; and (3) the public purpose served by the litigation.

¶ 29 Initially, we note that it is well-established that the opinions of any appellate court in Illinois and decisions of federal courts, other than the United States Supreme Court, are not binding on this court. See *People v. Spahr*, 56 Ill. App. 3d 434, 438 (1978) (and cases cited therein). Therefore, we need not accept respondents' alternate argument as binding. That said, even were we to adopt the three-part test enunciated in *Cartwright*, we would not find the attorney fees awarded unreasonable. Respondents contend that the award of attorney fees is inappropriate because there exists a substantial difference between the nominal amount awarded by the Commission and the recovery sought by complainants—Gilbert sought damages of $25,000 plus out of pocket costs and Gray sought damages of $30,000 plus out of pocket costs. Although there exists a small difference, here, as in *Shepard*, the recovery sought is not comparable to the $17 million sought in *Farrar*.

¶ 30 More importantly, complainants prevailed on a significant legal issue and the litigation served an important public purpose. As stated by the Commission in its final order on attorney fees, the award of attorney fees "serves the important public purpose of condemning and

punishing housing discrimination based on sexual orientation, deterring similar discriminatory conduct by condominiums and their officials, and encouraging other discrimination victims to pursue their claims." We agree. See *Becovic*, 296 Ill. App. 3d at 242-43 ("Damage awards under the Human Rights Act and other similar civil rights provisions infrequently reflect the social benefits obtained in remedying discrimination and vindicating civil rights. The availability of an award of attorney fees both encourages citizens to bring suit when their rights have been violated and provides incentives for attorneys to undertake representation in socially beneficial cases where the potential monetary recoveries are minimal.").

¶ 31 We briefly note that, given the nature of this case, the amount of attorney fees awarded does not represent an abuse of discretion. The record shows that considerable work was performed in pursuing this case over a course of at least five years. This work included, in part, discovery requests, interviewing witnesses, and preparing direct and cross examinations for an evidentiary hearing that took place over the course of six dates and during which 10 witnesses testified. Following the completion of the hearing, a closing argument brief was prepared, summarizing the witness testimonies and setting forth legal authority. Given the hearing officer's failure to issue a recommended decision, a position statement, motions and objections were also prepared and filed by complainants. Accordingly, we cannot say that the Commission abused its discretion in awarding complainants $68,189.05 in attorney fees.

¶ 32 For the reasons stated, the judgment of the circuit court of Cook County affirming the final administrative decision of the City of Chicago Commission on Human Relations is affirmed in its entirety.

¶ 33 Affirmed.