

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
June 24, 2020 Session

THE CITY OF JACKSON v. LOU BOSCO ET AL.

**Appeal from the Circuit Court for Madison County
No. C-15-59 Kyle C. Atkins, Judge**

No. W2019-00547-COA-R3-CV – Filed July 14, 2020

This case concerns a municipality's attempt to restrict the persons who are able to collect and dispose of construction waste within its city limits. In relevant part, the municipality generally prohibits persons from collecting and disposing of waste accumulated within its borders. That task is reserved, subject to certain exceptions, to the municipality, who has entered into an exclusive contract with a corporate entity for waste disposal. The Appellants herein are a waste disposal services company and its managing member. The managing member was cited individually in the municipality's Environmental Court for unauthorized refuse and trash disposal, and he was found to be in violation of the municipal ordinance. A de novo appeal was thereafter taken to the Circuit Court, where the waste disposal services company became a participating party. Among other things, the waste disposal services company asserted that the municipality's effort to circumscribe waste collection was a violation of the Tennessee Constitution's anti-monopoly and equal protection provisions. These constitutional claims were dismissed at summary judgment. In addition to its asserted constitutional claims, the waste disposal services company averred that certain of the City's municipal ordinances provided it with authority to conduct its operations. Following a later hearing, the Circuit Court declined to issue any fines but nonetheless enjoined the waste disposal services company from further removal of waste when it was not the actual producer of waste. Several issues are now raised for our review on appeal. For the reasons stated herein, the judgment of the Circuit Court is reversed, and the injunction is vacated.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

ARNOLD B. GOLDIN, J., delivered the opinion of the court, in which J. STEVEN STAFFORD, P.J., W.S., and KENNY ARMSTRONG, J., joined

T. Verner Smith and Vincent K. Seiler, Jackson, Tennessee, for the appellants, Lou Bosco, and Bosco Contractor Services, LLC.

Dale Conder, Jr., Lewis Latane Cobb and Teresa Anne Luna, Jackson, Tennessee, for the appellee, City of Jackson, Tennessee.

OPINION

BACKGROUND AND PROCEDURAL HISTORY

The Appellants in this matter are Lou Bosco (“Mr. Bosco”) and Bosco Contractor Services, LLC (“the LLC”). The LLC is a single member limited liability company that provides waste disposal services for construction and demolition sites on behalf of property owners and general contractors in the Jackson-Madison County, Tennessee area. Its managing member is Mr. Bosco. The Appellee herein is the City of Jackson, Tennessee (“the City”).

The genesis of the present controversy is traceable to late 2014 when multiple citations were issued to Mr. Bosco, *individually*, for unauthorized refuse and trash disposal. Specifically, Mr. Bosco was alleged to have violated Section 17-103 of the City’s Municipal Code. As is relevant, that authority provides, subject to certain specific exceptions, that “[n]o person shall convey over any of the streets or alleys of the city, or dispose of any refuse accumulated in the city.” Municipal Code § 17-103. The City is specifically listed as the party who will collect, convey, and dispose of all garbage, refuse, and trash and bulky waste. *Id.* Yet, the City is also permitted to “contract for the collection of such garbage and/or refuse and trash and bulky waste.” *Id.* Here, the City has in fact contracted with Waste Management, Inc. of Tennessee to be the exclusive collector of garbage within the City’s territorial limits.

Mr. Bosco was summoned to appear in the City’s Environmental Court, and ultimately, he was found guilty of violating Section 17-103 of the City’s Municipal Code and was fined. A *de novo* appeal was subsequently pursued in the Madison County Circuit Court (“the trial court”).

In the trial court, Mr. Bosco moved to dismiss the action against him, asserting that he did not own the trash containers for which he had been cited in the Environmental Court. According to Mr. Bosco, *the LLC* was the owner of those containers.¹ Additionally, Mr. Bosco filed a counterclaim requesting dismissal of the citations and an award of reasonable attorney’s fees, and the LLC sought relief as a third-party plaintiff, asserting a number of constitutional and statutory grievances related to the enforcement of Municipal Code Section 17-103. Among other things, the LLC asserted a violation of Tennessee’s anti-monopoly clause, Tenn. Const. art. 1, § 22. As part of its prayer for relief, the LLC sought

¹ At the time, Mr. Bosco inadvertently referred to the LLC by a different name. This misnomer was later acknowledged, and the trial court specifically entered an order in the trial court proceedings amending pleadings to correct it.

an injunction prohibiting enforcement of Section 17-103.

On November 10, 2015, the City moved for summary judgment. As to an asserted dormant Commerce Clause challenge under the federal constitution, the City contended that the LLC lacked both constitutional and prudential standing. It also submitted, among other arguments, that there was no violation of Tennessee's anti-monopoly clause. In April 2016, the trial court entered an order granting the City's summary judgment motion. In pertinent part, the trial court found as follows:

[T]he Court finds that the ordinance is not facially discriminatory against out-of-state interests and that neither Bosco nor [the LLC] are involved in interstate commerce. Therefore, Bosco and [the LLC] lack prudential standing to bring this action.

.....

[B]ecause the Court has determined that Bosco lacks standing to pursue these claims, the Court grants the city's summary-judgment motion and dismisses the counter-claim of Bosco and third party complaint of [the LLC] as it relates to the claims of Bosco and [the LLC] against the city based upon U.S. Const. art. 1, § 8, cl. 3, the Tennessee State Constitution Article 1 § 22 and Article XI, § 8, and the Tennessee Trade Practices Act as codified in Tenn. Code Ann. § 47-25-101 et seq.

Whether the relevant ordinance had been violated was reserved for determination at a later date.

An amended pleading was thereafter filed by Mr. Bosco and the LLC, wherein a declaration was sought that the Municipal Code actually had provisions that authorized the LLC's disposal of construction waste. The City filed an answer on January 17, 2019, and subsequently, on January 23, 2019, which was the day of the trial in this matter, the parties entered into "Stipulations of Law and Facts." Among other things, the following stipulations were made:

5. [The LLC] was acting as an agent or subcontractor of the general contractor, conveying and disposing of construction waste on behalf of the contractor for each of these violations at issue.
6. [The LLC] delivers metal roll-off containers to be left at construction sites for collecting construction wastes for contractors.
7. Once a contractor fills the container of [the LLC] with construction garbage and refuse, [the LLC] sends an employee to the construction site,

delivers another empty container if need be, picks up the filled container, and hauls the filled container from the construction site to the landfill.

8. [The LLC] was not acting as [a] property owner for any of the violations at issue in this case.

9. [The LLC] was not the producer of the wastes for any of the violations at issue in this case.

10. [The LLC] did not pull any demolition permits for any of the violations at issue in this case.

The month following trial, on February 25, 2019, the trial court entered a judgment holding that there should be no fines, despite stating that the citations that had issued in this case were a part of the City's duty to promote the responsible removal of waste. The court, however, did enjoin the LLC from "removing trash and bulky waste as a subcontractor when it was not the actual producer of the waste." After various post-trial motions were later filed and denied, this appeal followed.

ISSUES PRESENTED

The Appellants raise three issues in their appellate brief, which we have restated and reordered as follows:

1. Whether Mr. Bosco is subject to individual liability for a violation of the Municipal Code.
2. Whether the City's Municipal Code authorizes the LLC to operate as a subcontractor providing construction garbage and refusal disposal services in the City.
3. Whether the trial court erroneously granted summary judgment to the City on the LLC's state constitutional claims.²

² In addition to responding to the above issues with certain raised arguments, the City independently sets forth several issues of its own in its appellate brief. As is evident from the City's presentation of its issues, however, the City does not actually seek any relief from the trial court's judgment. Rather, it aims to establish bases upon which the Appellants' grievances can be rejected. Specifically, the City's raised issues are as follows:

1. Has Bosco Contractor Services, LLC . . . waived appellate review of its state-constitution issues by failing to raise these issues during the trial?

DISCUSSION

Whether Mr. Bosco is subject to individual liability

As delineated in the Appellants' "Statement of the Issues" section of their appellate brief, the first raised issue on appeal is "Whether the Defendant Bosco is subject to individual liability for any violation of § 17-103 of the Municipal Code of the City of Jackson." The concern undergirding this issue stems from the City's decision to sue Mr. Bosco individually in Environmental Court instead of pursuing relief against the LLC. Suffice it to say, it is unclear to us also why individual liability against Mr. Bosco was originally sought in this case, but we do not need to entertain that question any further or specifically adjudicate the matter. Although Mr. Bosco was found to be in violation of the Municipal Code in the Environmental Court, the question of whether it was appropriate to subject him to individual liability is now a moot one. On the de novo appeal to Circuit Court, no liability against him was entered. The Circuit Court declined to issue any fines, ultimately enjoining only *the LLC*. The issue of Mr. Bosco's individual liability therefore being moot, we decline to address this issue.

Whether the Municipal Code authorizes the LLC to dispose of construction garbage and refuse

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2. Because the LLC failed to join a necessary party, were the state constitutional claims to invalidate the contract justiciable?
 3. Did the trial court correctly hold that the LLC lacked prudential standing to pursue relief under the Dormant Commerce Clause?
 4. Has the Third-Party Defendant City of Jackson sufficiently set forth alternative bases for this Court to affirm the trial court?

As discussed later in this opinion, because we do not attempt to reach the raised constitutional questions in this appeal, it follows that the City's first two issues are pretermitted. As to the fourth presented "issue," we construe it simply as an argumentative reminder by the City that we may affirm the trial court's judgment on bases alternative to those relied upon by the trial court. No discernible argument specifically corresponding to the issue really appears to be present in the brief, with the sole exception of a footnote where the legal principle is stated. As best as we can understand from the sparse presentation on the matter in the City's brief, the intended argument by the City is made in reference to the trial court's summary judgment order, which cited the lack of "prudential standing," namely that the LLC was not involved in interstate commerce, as the basis to dismiss not only the federal dormant Commerce Clause claim but also the state constitutional claims. As indicated herein, we do not review the dismissal of the state constitutional questions in this appeal, or the dismissal of the federal constitutional claim for that matter, and as such, we need not entertain whether there might be alternative bases to affirm the trial court's summary judgment order. As for the City's third raised issue, which seeks to uphold the trial court's finding that the LLC lacked prudential standing relative to its dormant Commerce Clause challenge, we observe that the LLC has not appealed the dismissal of its asserted federal constitutional claim. As such, we need not entertain the City's third issue, and it is hereby pretermitted.

The pivotal question on appeal relates to the propriety of the LLC's waste disposal business. In its attempt to demonstrate that its business model regarding waste disposal is a lawful one, the LLC maintains that the Municipal Code has several provisions that allow for its activities. The City vigorously argues the opposite position.

The question of whether authority is granted to dispose of refuse is a relevant one here given the collection scheme codified in the Municipal Code. Indeed, as generally referenced earlier in this opinion, trash collection is, by default, reserved to the City absent a delineated exception:

17-103. Collection – to be made by city; exception. All garbage and/or refuse, trash and bulky waste shall be collected, conveyed and disposed of by the city. The city may contract for the collection of such garbage and/or refuse and trash and bulky waste or any part thereof. No person shall convey over any of the streets or alleys of the city, or dispose of any refuse accumulated in the city, except as noted hereafter[.]

Municipal Code § 17-103. Thus, unless some provision in the Municipal Code indicates that activity to the contrary is permitted, only the City (or a party with whom the City contracts) may dispose of trash accumulated within the City.

Section 17-103 goes on to specifically outline certain exceptions to the default rule, including one allowing property owners to “personally” collect and dispose of waste. Municipal Code § 17-103(1). On appeal, the LLC maintains that an applicable exception giving them authority to collect waste can be found in Section 17-103(2). That provision reads as follows: “(2) Exception for trash and bulky waste. Any producer of trash and bulky waste, as defined in this chapter, may personally transfer such trash and bulky waste and dispose of same in the city landfill[.]” Municipal Code § 17-103(2). We fail to see how this provision provides the LLC with any authority. As we have discussed, it was stipulated in this matter that the LLC “was acting as an agent or subcontractor of the general contractor, conveying and disposing of construction waste on behalf of the contractor for each of these violations at issue” and that the LLC “*was not the producer* of the wastes for any of the violations at issue.” (emphasis added). Inasmuch as the exception in Section 17-103(2) is clearly limited to a “producer” of waste, which the LLC was not in this matter, it is inapplicable here.

Despite the inapplicability of Section 17-103(2), we agree with the LLC that another provision in the Municipal Code indicates that the LLC does have the authority to collect certain waste, and with this in mind, we turn to Section 17-105, which contains several “Special Requirements” applicable to the collection of waste within the City. Section 17-105(4), which is relied on specifically by the LLC here, deals with waste materials resulting from, among other things, the “construction or destruction of buildings.” In full, the

provision reads as follows:

(4) Construction garbage and refuse. Quantities of garbage and refuse materials resulting from the repair, excavation, construction or destruction of buildings, such as, but not limited to, broken concrete, dirt, sand, gravel, trees, tree limbs, woollen wastes or any other nonputrescible materials, shall be removed and disposed of by the contractor, owner or person having same in charge by a method satisfactory to the director of health and sanitation.

Municipal Code § 17-105(4).

As is evident, the City has mandated that the responsibility for the disposal of construction waste begins with contractors. *See also* Municipal Code § 17-101(12) (“[C]ontractors will be required by city ordinance to pick up their own trash and bulky waste and dispose of same in accordance with city ordinance.”). Yet, pursuant to Section 17-105(4), it is clear that the refuse materials resulting from the construction or destruction of buildings may be removed by one of three parties in order to ensure that the waste is cleared from sites. Specifically, the materials “shall be removed and disposed of by the contractor, owner or **person having same in charge.**” Municipal Code § 17-105(4) (emphases added).

Here, the LLC submits that it qualifies as a “person having same in charge.” We agree. As noted before, the following facts, among others, were stipulated to by the parties prior to the trial of this matter:

5. [The LLC] was acting as an agent or subcontractor of the general contractor, conveying and disposing of construction waste on behalf of the contractor for each of these violations at issue.
6. [The LLC] delivers metal roll-off containers to be left at construction sites for collecting construction wastes for contractors.
7. Once a contractor fills the container of [the LLC] with construction garbage and refuse, [the LLC] sends an employee to the construction site, delivers another empty container if need be, picks up the filled container, and hauls the filled container from the construction site to the landfill.

The facts clearly support that the LLC was placed in charge of disposing of the construction waste, and as such, it was a “person having same in charge.”

At oral argument, counsel for the City suggested that the “person having same in charge” language perhaps contemplates a lessee of property, but we observe that no such qualification or limitation is engrafted into the Municipal Code provision. As written, it is

clear that persons having construction refuse in their charge are permitted to dispose of same, and here, the LLC so qualifies. The City also hastens to argue that disposal pursuant to Section 17-105(4) must be “by a method satisfactory to the director of health and sanitation,” *id.*, and in its brief, it states that “[h]aving a subcontractor to dispose of the waste is not a method satisfactory to the director of health and sanitation.” It is apparent that the focus of the City’s argument here is not actually on the *method* of disposal; rather, it is clear that the crux of the City’s argument remains tethered to the identity of the trash collector, a point that we have already addressed in our discussion of the “person having same in charge” language. Indeed, when attempting to substantiate its argument on this issue, the City offers the following explanation in its appellate brief:

Bosco attempts to shift the focus of [the method satisfactory phrase] by asserting that it has the same type of roll-off containers that Waste Management has. That argument misses the point. Although an actual producer or property owner may haul his own construction waste, nowhere in the City Ordinance is hiring out this service allowed. The only satisfactory methods are collection by Waste Management, the property owner, or the actual producer.

As we have already discussed, however, persons having *construction* refuse in their charge may dispose of it, and here, the LLC is such a party. No doubt, the City is permitted to regulate the actual method of disposal in such circumstances, but insofar as Section 17-105(4) would admit, the scrutiny applying to disposal methods must apply equally to contractors, owners, and other parties having construction refuse in their charge. In other words, there is nothing in the provision suggesting that the City can place more restrictive requirements on a “person having same in charge” than it would impose on a contractor or owner. The provision simply indicates that authorized parties, including persons “having same in charge,” must dispose of construction refuse “by a *method* satisfactory to the director of health and sanitation.” *Id.* (emphasis added). Of course, in this case, the City has not taken umbrage at any specific disposal method of the LLC. Its principal criticism, it would appear, is that the LLC is simply not within the class of persons authorized to dispose of construction refuse.³ Based on the current language of Section 17-105(4) and

³ At trial, there did not appear to be any real criticism of the LLC’s disposal method, just the criticism that the LLC did not purportedly fall within the bounds of the ordinance. According to the City’s director of health and sanitation, the LLC was simply not allowed to be involved in removal of construction waste:

Q All right. But if someone is doing a commercial remodeling of a house and sets their construction debris out on the curb, you’ll tell them to either hire someone to take it off or do it themselves.

A That’s correct.

Q And if they hire someone, does it have to be Waste Management?

for the reasons discussed above, we reject the City's position on this matter and hereby reverse the trial court's judgment and vacate the injunction entered against the LLC in this case.

Given our determination that the LLC is permitted under Section 17-105(4) to dispose of construction waste within the municipal limits of the City, we are of the opinion that we do not need to entertain its asserted state constitutional claims, which were framed with respect to the City's ordinances and contract with Waste Management, Inc. of Tennessee. *See Henderson v. City of Chattanooga*, 133 S.W.3d 192, 215 (Tenn. Ct. App. 2003) (“[O]ur courts will not decide constitutional issues unless resolution is absolutely necessary for determination of the case and the rights of the parties.”). As such, further inquiry into the trial court's dismissal of those claims is hereby pretermitted and, likewise, so is an examination of the City's raised issues in defense of these claims.

CONCLUSION

For the foregoing reasons, the trial court's judgment is reversed, the injunction is vacated, and the case is remanded.

ARNOLD B. GOLDIN, JUDGE

A It has to be Waste Management.

Q All right. Is that within the ordinance?

A Yes.

The upshot of the testimony appeared to be that the LLC was not allowed to dispose of construction waste because doing so would conflict with the City's contract with Waste Management. Indeed, when explaining why approval would not have been given if Mr. Bosco had approached the City, the director stated as follows: “Because we have an exclusive contract with Waste Management, and the ordinance prevents it.” When the trial court judge later inquired as to whether Mr. Bosco had handled the waste improperly, counsel for the City responded, “No, sir. This is about . . . he's not authorized to do it.” Counsel would then go on to state as follows: “We have no proof that he's not disposed of it properly.”