

#29907-a-SRJ
2022 S.D. 81

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

CITY OF SIOUX FALLS,

Plaintiff and Appellee,

v.

VITALIY STRIZHEUS and
NATALIYA STRIZHEUS,

Defendants and Appellants,

and

ALL OTHER INTERESTED PARTIES,

Defendants.

* * * *

APPEAL FROM THE CIRCUIT COURT OF
THE SECOND JUDICIAL CIRCUIT
LINCOLN COUNTY, SOUTH DAKOTA

* * * *

THE HONORABLE JOHN PEKAS
Judge

* * * *

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CONSIDERED ON BRIEFS
OCTOBER 3, 2022
OPINION FILED 12/28/22

JENSEN, Chief Justice

[¶1.] Vitaliy and Nataliya Strizheus began construction on a house in Sioux Falls in 2013. Before the house was completed, construction stalled and the City of Sioux Falls (City) sought to have the partially completed house demolished under the City ordinance (Ordinance). The circuit court granted summary judgment to the City and ordered the demolition of the house. The Strizheuses appeal. We affirm.

Facts and Procedural History

[¶2.] The Strizheuses purchased land at 6800 South Westfield Trail in Sioux Falls in 2013 with the intent to build a multi-million-dollar, single-family home on the property. A building permit was issued by the City on August 12, 2013, and the couple contracted with Creative Building Corporation (CBC) to start construction. The project was initially self-funded by the Strizheuses. Progress on the home stalled in 2015, when the house was partially completed, apparently due to a lack of finances and other family circumstances.

[¶3.] On August 31, 2016, the City found the house to be an unsafe structure as defined by section 108.1.1 of the International Property Maintenance Code (IPMC)¹ and unfit for human occupancy as defined by section 108.1.3 of the IPMC.²

1. Section 108.1.1 of the IPMC provides a definition of unsafe structures:

An unsafe structure is one that is found to be dangerous to the life, health, property or safety of the public or the *occupants* of the structure by not providing minimum safeguards to protect or warn *occupants* in the event of fire, or because such structure contains unsafe equipment or is so damaged, decayed, dilapidated, structurally unsafe or of such faulty construction or
(continued . . .)

The City has adopted the entire IPMC through Sioux Falls City Ordinance (SFCO) § 150.095 subject to certain amendments, additions, and deletions which are set forth in SFCO § 150.096.³ The City issued a notice of demolition ordering the Strizheuses to begin demolition of the house pursuant to SFCO § 150.096.

[¶4.] SFCO § 150.096 provides:

The code official shall order the owner or owner's authorized agent of any premises upon which is located any structure, which in the code official's or owner's authorized agent judgment after review is so deteriorated or dilapidated or has become so out of repair as to be dangerous, unsafe, insanitary, or otherwise unfit for human habitation or occupancy, and such that it is unreasonable to repair the structure, to demolish and remove such structure; or if such structure is capable of being made safe by repairs, to repair and make safe and sanitary, or to board up and hold for future repair or to demolish and remove at the owner's option; or where there has been a cessation of normal construction of any structure for a period of more than 18

(. . . continued)

unstable foundation, that partial or complete collapse is possible.

2. Section 108.1.3 of the IPMC describes structures that are unfit for human occupancy:

A structure is unfit for human *occupancy* whenever the *code official* finds that such structure is unsafe, unlawful or, because of the degree to which the structure is in disrepair or lacks maintenance, is insanitary, vermin or rat infested, contains filth and contamination, or lacks *ventilation*, illumination, sanitary or heating facilities or other essential equipment required by this code, or because of the location of the structure constitutes a hazard to the *occupants* of the structure or to the public.

3. Section 110.1 of the IPMC, one of the sections modified by SFCO § 150.096, is the primary provision the City relies upon to support its right to demolish the partially completed home. For the sake of clarity, we reference SFCO § 150.096 throughout the opinion rather than referring to section 110.1 of the IPMC.

months, the code official shall order the owner or owner's authorized agent to demolish and remove such structure.⁴

The Strizheuses appealed the order for demolition to the Property Maintenance Board of Appeals (the Board), and the Board granted the Strizheuses an extension until December 1, 2016 to complete the exterior of the house.

[¶5.] The exterior of the house was not completed by the end of 2016, and there is no evidence of other construction on the home during this time. On September 22, 2017, the City issued an amended notice and order for demolition to the Strizheuses, finding the structure still in violation of the Ordinance, and that demolition was authorized under SFCO § 150.096. The order required the Strizheuses to complete demolition of the house by November 11, 2017. The Strizheuses did not appeal or otherwise challenge this order.

[¶6.] After the Strizheuses failed to commence demolition, the City filed a complaint in circuit court against the Strizheuses on December 10, 2018, seeking enforcement of the Ordinance.⁵ The complaint alleged that at least seven building permits had been issued for the property since the initial permit was issued in 2013 and each had been suspended or cancelled because of a lack of progress or request

4. SFCO § 150.096 modifies the IPMC by changing the time period of cessation of normal construction required before demolition can be ordered from two years to eighteen months.

5. Prior to filing the complaint, the Strizheuses received numerous citations from the City, including a notice to abate nuisance for broken concrete, piles of rocks, and wood pieces and pallets; multiple health citations for rubbish/waste material; multiple citations for failing to secure the structure; and multiple citations for vegetation violations.

for inspection, with the latest permits expiring in 2018. The complaint sought an order from the court to demolish the house and restore the lot to grade.

[¶7.] The Strizheuses did not answer the complaint but took out another building permit. The City moved for a default judgment. The Strizheuses hired counsel shortly before the hearing on the motion for default judgment and requested additional time to answer the City's complaint. In addition, Vitaliy submitted an affidavit representing that CBC had once again begun work on the building and was expected to finish the exterior of the building by October 1, 2019. The circuit court denied the motion for default judgment and granted the Strizheuses additional time to answer.

[¶8.] More than two years later, the City filed a motion for summary judgment. Along with the motion, it filed a statement of undisputed material facts and several affidavits. Richard Warrington, the chief building official for the City, provided an affidavit which stated that the building permit taken out in 2019 had expired because of lack of progress and that no inspections had been requested. Warrington alleged the Strizheuses had made some "cosmetic repairs" in 2019, but there had been no progress toward completing construction at the property after the 2019 permit was issued. He further claimed that there had been no formal inspection on the property since May 15, 2015.

[¶9.] Troy Stallings of CBC provided an affidavit stating that his company had not performed any construction work on the property requiring inspection since 2015 and that there was currently no agreement in place between CBC and the

Strizheuses to restart work on the property. CBC had also cancelled its insurance on the project because it was no longer an active construction project.

[¶10.] Nearly identical affidavits from three neighboring landowners were also submitted in support of the City’s motion. The three affidavits included statements that said “[o]ver the past several years, there has been very little work done at the Westfield Home, and I do not believe that there has been much, if any, work completed on the Westfield Home during the past two years.”

[¶11.] The Strizheuses failed to submit a response to the City’s statement of undisputed material facts as required by SDCL 15-6-56(c), or any other written response to the motion for summary judgment. They did, however, take out a ninth building permit for the house.

[¶12.] A hearing on the motion for summary judgment was held on December 28, 2021. At the hearing and in its brief to the court, the City asserted that the demolition order was issued by the City because the Strizheuses had repeatedly failed to finish construction and there had been no “normal construction” on the property since 2015. The City contended that while the Strizheuses had taken out multiple building permits, they had failed to make any progress toward completion of the home. The City also claimed that the Strizheuses had recently purchased another home in Sioux Falls, which was evidence that they had abandoned the construction project and were instead putting their money toward other ventures.

[¶13.] Vitaliy appeared pro se and countered the City’s case at the hearing with unsworn statements that he planned to complete the home in the near future but was having trouble obtaining the financing. Vitaliy stated that in 2018, he

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painted the exterior of the house and had garage doors and a front door installed. He also claimed that he hired another contractor and there was currently work being done on the roof of the house. Finally, Vitaliy stated that he expected the work on the outside of the house to be finished by the end of the summer and the house to be completed by 2023.

[¶14.] The circuit court orally granted summary judgment for the City, finding that the City had shown that normal construction had ceased for over eighteen months and the Strizheuses had provided no evidence to support their contrary position. Following the hearing, the circuit court entered an order and judgment granting the City’s motion for summary judgment and allowing the City to “secure the services of outside parties deemed necessary to commence demolition of the structure(s) [on the property] and to restore the lot to grade[.]” The Strizheuses appeal the entry of summary judgment, arguing that the City failed to meet its burden to establish the absence of “normal construction” for a period of eighteen months.

Analysis

[¶15.] This Court has a well-established standard for considering a ruling granting summary judgment.

“We review a grant or denial of summary judgment de novo.” *Hamen v. Hamlin Cnty.*, 2021 S.D. 7, ¶ 15, 955 N.W.2d 336, 343. “Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Hanson v. Big Stone Therapies, Inc.*, 2018 S.D. 60, ¶ 23, 916 N.W.2d 151, 158. “The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party.

The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists.” *Saathoff v. Kuhlman*, 2009 S.D. 17, ¶ 11, 763 N.W.2d 800, 804.

Sheard v. Hattum, 2021 S.D. 55, ¶ 22, 965 N.W.2d 134, 141.

Prima Facie Case

[¶16.] The Strizheuses argue that the City failed to present a prima facie case on summary judgment to establish that it was entitled to judgment as a matter of law. They contend that the City failed to establish that there had not been any construction on the home for a period of at least eighteen months. Further, they assert that the City did not provide a definition of “normal construction” or otherwise establish the absence of “normal construction” for a period of eighteen months, as required by SFCO § 150.096 to authorize demolition of the house.

[¶17.] The City responds that it presented undisputed facts that there had not been normal construction on the house for more than eighteen months, and the Strizheuses failed to refute these undisputed facts. The City argues that it was legally entitled to a demolition order upon a showing of a cessation of “normal construction” on the premises for a period of eighteen months. It asserts that the phrase “normal construction” is unambiguous, and the facts establish, as a matter of law, the lack of any progress after 2015 toward completion of the house.

[¶18.] In summary judgment proceedings, “[t]he burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law.” *Gail M. Benson Living Tr. v. Physicians Off. Bldg., Inc.*, 2011 S.D. 30, ¶ 9, 800 N.W.2d 340, 343 (quoting *W. Consol. Co-op. v. Pew*, 2011 S.D. 9, ¶ 19, 795 N.W.2d 390, 396). Therefore, we

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examine the text of SFCO § 150.096 and the record to determine whether the City presented undisputed facts showing that “normal construction” had ceased for more than eighteen months.

[¶19.] “The interpretation of an ordinance presents a question of law which we review *de novo*.” *Peters v. Spearfish ETJ Planning Comm’n*, 1997 S.D. 105, ¶ 5, 567 N.W.2d 880, 883.

The fact the parties disagree as to the meaning to be given to an ordinance, and an appeal such as the one before us results, does not make the ordinance ambiguous *per se*. Words and phrases in the ordinance must be given their plain meaning and effect and, if the language is clear, certain and unambiguous, our only function is to declare the meaning of the ordinance as expressed.

Id. ¶ 8, 567 N.W.2d at 884 (internal citation omitted).

[¶20.] The relevant portion of the Ordinance provides that “where there has been a cessation of normal construction of any structure for a period of more than 18 months, the code official shall order the owner or owner’s authorized agent to demolish and remove such structure.” SFCO § 150.096. Neither the IPMC nor the Ordinance defines “normal construction.” “When a term is not defined in an ordinance, we interpret the term according to its usual and ordinary meaning.”

Irvine v. City of Sioux Falls, 2006 S.D. 20, ¶ 8, 711 N.W.2d 607, 610. We have often applied dictionary definitions for an undefined term in an ordinance or statute. *See id.* (using the American Heritage Dictionary to define the term “conclusive” in a city ordinance); *State v. Young*, 2001 S.D. 76, ¶ 6, 630 N.W.2d 85, 87 (applying the American Heritage Dictionary definition to the term “completely” in a statute).

[¶21.] The American Heritage Dictionary defines “normal” as “[c]onforming, with, adhering to, or constituting a norm, standard, pattern, level or type; typical[.]”

The American Heritage Dictionary defines “construction” as “the act or process of constructing” or “the art, trade or work of building.” Thus, the common understanding of the phrase “normal construction” in the Ordinance means the standard or typical process of building or constructing the subject structure.⁶ The language does not obligate the City to show the absence of “any” construction on the structure for eighteen months but, rather, the cessation of “normal” construction for that period of time.⁷

[¶22.] The City’s motion presented facts showing the general contractor had not performed work at the site since 2015 and that no City inspections of work at the site had been requested since 2015.⁸ The record also demonstrates that the

6. The Strizheuses do not attempt to define “normal construction.” The only authority they cite to in their discussion of “normal construction” is *Bailey & Biddle LLC v. City of St. Joseph*, No. 340989, 2019 WL 573090 (Mich. Ct. App. 2019). However, the unpublished opinion is of no assistance as the opinion does not define the phrase “normal construction” and is focused on a different portion of IPMC section 110.1.

7. Although not well developed in the briefs, the Strizheuses suggest that the City was required by SFCO § 150.096 to show not just the cessation of “normal construction” for a period of eighteen months, but also that the house “could not be made a suitable residence.” SFCO § 150.096 provides three separate grounds upon which the City may seek demolition of a structure. The City alleged all these alternative grounds in its complaint but relied on the absence of “normal construction” for a period of eighteen months in its motion for summary judgment. The Strizheuses fail to cite any portion of the Ordinance or any other authority to support a claim that the City is not entitled to a demolition order based solely upon a showing of “a cessation of normal construction of any structure for a period of more than 18 months.”

8. The Strizheuses argue that the circuit court improperly relied upon these facts to support a prima facie case for summary judgment. They assert that the court incorrectly assumed “normal construction” “[required] a building permit and inspections must be conducted” during this time period. The Strizheuses cite work that they claim is part of the “normal construction” but

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City initially gave an order for demolition to the Strizheuses in September 2016 based upon the condition of the house but extended the demolition order until the end of the year. After there was no request to inspect the exterior of the home and “[c]onstruction of the structure has ceased and [two building permits] have been suspended for lack of work,” the City issued an amended order for demolition to the Strizheuses in September 2017. The order required the Strizheuses to complete demolition of the unfinished house by November 11, 2017. The City acknowledged that the Strizheuses had “briefly worked on the property for some cosmetic repairs in 2019 but no inspections were conducted.” Finally, three neighboring property owners submitted affidavits stating that there had been minimal, if any, work done on the property for several years.

[¶23.] These facts were sufficient to create a prima facie case that the City was entitled to issue the 2017 amended demolition order under SFCO § 150.096 because of the “cessation of normal construction . . . for a period of more than 18 months[.]” Moreover, the City presented facts showing that the cessation of normal construction continued after 2017 up through the time of the summary judgment hearing in 2021. While there was evidence of some maintenance work at the site in 2019, there had been none of the typical progress associated with building and

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does not require a building permit under the Ordinance, such as “one-story detached accessory structures, painting, papering, tiling, carpeting, cabinets, countertops, and similar finish work.” While this finish work may be necessary to complete the home, there were never progress inspections on the home that would have allowed them to do the finish work. More importantly, the Strizheuses failed to present any evidence to show that any finish work was completed after 2015.

completing the home for six years. Because the City presented a prima facie case that it was entitled to judgment as a matter of law on the question of demolition, the burden then shifted to the Strizheuses to show that a “genuine, material issue for trial exists.” *Sheard*, 2021 S.D. 55, ¶ 22, 965 N.W.2d at 141 (citation omitted).

[¶24.] The Strizheuses did not respond to the City’s statement of undisputed material facts, provided no affidavits or other documentary evidence, and provided no sworn testimony resisting the City’s motion. In particular, they failed to present facts showing “normal construction” or, for that matter, any construction had taken place at the site from the end of 2015 until the amended order for demolition was issued by the City more than eighteen months later, in September 2017.

[¶25.] The Strizheuses cite *Velocity Invs., LLC v. Dybvig Installations, Inc.*, 2013 S.D. 41, 833 N.W.2d 41, in support of their claim that “[s]ummary judgment is not obtained merely because a party does not respond to the statement of undisputed material facts.” In *Velocity Invs.*, this Court reversed the entry of summary judgment after identifying in the record “a number of factual questions and unresolved legal issues” regarding the defendants’ alleged personal guarantee of a business line of credit, even though there was a lack of resistance from the non-moving party. *Id.* ¶ 15, 833 N.W.2d at 45. Unlike *Velocity Invs.*, the Strizheuses have failed to identify any genuine issues of material fact on this record concerning the question of whether there had been “normal construction” on the house for eighteen months.

[¶26.] The Strizheuses also contend that some of the work they performed on the home after 2015 created genuine issues of material fact precluding summary

judgment. Specifically, Vitaliy claimed at the summary judgment hearing that he had completed external work on the house in 2019, including installing garage doors and painting, and that he had hired another contractor who was performing some work on the roof at the time of the summary judgment hearing. However, even if such acts could be construed as “normal construction,” the statements were not under oath and any attempt by Vitaliy to offer oral testimony at the hearing would have been improper under these circumstances. The text of our Rule 56 does not provide for the use of oral testimony at the summary judgment hearing to support or resist a summary judgment motion. We have stated that “oral testimony at summary judgment motions’ hearings should be allowed only in rare circumstances and for the exclusive purposes of clarification or correction.” *Millard v. City of Sioux Falls*, 1999 S.D. 18, ¶ 12, 589 N.W.2d 217, 219. Without a doubt, any effort by Vitaliy to present oral testimony at the summary judgment hearing was neither a clarification nor a correction, as he offered nothing to be clarified or corrected.

[¶27.] SDCL 15-6-56(c)(2) provides that “[a] party opposing a motion for summary judgment shall include a separate, short, and concise statement of the material facts as to which the opposing party contends a genuine issue exists to be tried.” The Strizheuses provided no statement showing the facts they considered disputed. Additionally, SDCL 15-6-56(e) provides that

[w]hen a motion for summary judgment is made and supported as provided in § 15-6-56, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in § 15-6-56, must set forth specific facts showing that there is a genuine issue for trial. If

he does not so respond, summary judgment, if appropriate, shall be entered against him.

The Strizheuses failed to present any affidavits or documentary evidence setting forth specific facts that create a genuine issue for trial. “Entry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Dakota Indus., Inc. v.*

Cabela’s.com, Inc., 2009 S.D. 39, ¶ 11, 766 N.W.2d 510, 513 (quoting *Zephier v. Catholic Diocese of Sioux Falls*, 2008 S.D. 56, ¶ 6, 752 N.W.2d 658, 662).

[¶28.] Therefore, the circuit court properly granted summary judgment to the City.

Third-Party Demolition

[¶29.] Finally, the Strizheuses argue that the City should not be authorized to employ a third party to demolish the house. They fail to cite any authority in support of this claim. Section 110.3 of the IPMC specifically permits the City to contract with a third party to complete the demolition of a structure for the City, stating “[i]f the owner of a premises or owner’s authorized agent fails to comply with a demolition order within the time prescribed, the code official shall cause the structure to be demolished and removed, either through an available public agency or by contract or arrangement with private persons[.]”

[¶30.] The amended notice and order issued by the City on September 22, 2017, ordered the Strizheuses to complete demolition work by November 11, 2017. The Strizheuses did not commence demolition work as required by the order and failed to otherwise appeal or challenge the demolition order. On this record, the

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Ordinance specifically authorized the City to employ a third party to demolish the house.

[¶31.] We affirm.

[¶32.] KERN, DEVANEY, and MYREN, Justices, and GERING, Circuit Court Judge, concur.

[¶33.] GERING, Circuit Court Judge, sitting for SALTER, Justice, who deemed himself disqualified and did not participate.