FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 314

Filed August 9, 1979

RALPH R. JACOBSEN,

Plaintiff-Appellant,

vs.

CITY OF BEDFORD, IOWA AND HOWARD COON, KAY JOHNSON, CLIFTON HANSHAW, MICKIE WARE, CLYDE STEPHENS, AND CLYDE SPENCER, as Individuals and Members of the City Council of the City of Bedford, Iowa,

Defendants-Appellees.

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2-62301

Appeal from Taylor District Court - M. C. Herrick, Judge.

Plaintiff appeals from dismissal of his petition for injunctive relief to prevent defendant from interfering with his attempts to sell vacuum cleaners. REVERSED AND REMANDED.

Davidson & Hemphill of Clarinda, Iowa, for plaintiff-appellant.

Michael F. Travis of Clarinda, Iowa, and Ronald D. Bonnett of Wilson, Bonnett & Christensen, Lenox, Iowa, for defendants-appellees.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

In this action plaintiff seeks injunctive relief against acts of defendant prohibiting plaintiff from promoting and demonstrating vacuum cleaners in the city of Bedford, Iowa. The trial court dismissed plaintiff's petition and he appeals.

I. All of the evidence presented in the trial court was at a hearing on an application for temporary injunction. Following this hearing the trial court dismissed the claim on the merits. We do not pass upon the validity of this procedure because the parties do not argue the issue. We note, however, that ordinarily the court's action in denying a temporary injunction does not serve to deprive a plaintiff of the right to a later trial on the merits absent a stipulation to be bound by such ruling. See Iowa City v. Muscatine Development Co., 258 Iowa 1024, 141 N.W.2d 585 (1966).

II. The trial court's ruling denying relief contains skeletal findings of fact and conclusions of law sufficient to comply with R.C.P. 179. It is made to appear therefrom that the decision of the court was predicated upon its determination that the acts sought to be enjoined were validly undertaken pursuant to the terms and provisions of certain municipal ordinances of the city of Bedford.

Plaintiff asserts on appeal that the trial court's reliance on these ordinances was improper because they had not, in some proper manner, been made part of the record. We agree with this contention. The ordinances were not a proper matter for judicial notice under the principles discussed in Weldon v. Zoning Board, 250 N.W.2d 396, 399 (Iowa 1977). And, the ordinances were not made a part of the record in the court below.

Defendants contend that failure to make the ordinances part of the record is fatal to plaintiff's case rather than their own. They seeks to characterize plaintiff's action as one to be relieved from the application of the ordinances thereby placing the burden on plaintiff to show what the ordinances involved. We cannot so interpret plaintiff's petition. It is an action to enjoin conduct by defendants. Although reference is made to some unspecified ordinance in an affidavit filed by plaintiff, his petition does not allege or rely upon any designated ordinance.

The evidence offered by plaintiff at the hearing on temporary injunction showed his sales operation was not a nuisance and it does not appear to be contrary to any provision of general law. We therefore conclude that if defendants wished to justify their actions based upon a local ordinance, it was they who had the burden to place the ordinance of record. Defendants having failed to do so, plaintiff may well have been

entitled to a temporary injunction at the conclusion of the hearing. But we do not decide this. The appeal is from the dismissal of the action on the merits.

Such dismissal was erroneous because it was predicated upon an ordinance not properly made part of the record. We may not permit expansion of the record on appeal so as to include matters never made a part of the record below. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.