METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, ET AL.	)	
	)	Davidson Chancery
Plaintiffs/Appellees,	)	No. 91-2997-III
VS.	)	
	)	Appeal No.
ANN MARTIN, ET AL.	)	01-A-01-9508-CH-00381
Defendants/Appellants.	)	

IN THE COURT OF APPEALS OF TENNESSEE

MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE CHANCERY COURT OF DAVIDSON COUNTY

AT NASHVILLE, TENNESSEE

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AFFIRMED AND REMANDED

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:
SAMUEL L. LEWIS, JUDGE

CONCURS WITH RESULT:
WILLIAM C. KOCH, JR., JUDGE

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O P I N I O N

The Defendants, Ann Martin and AME, Inc. have appealed from a judgment of the Trial Court finding them in contempt of court, ordering them to cease an desist from certain activities, closing defendant's business Friday, August 4, 1995, through Monday, August 7, 1995, and taxing them with costs.

Only an abbreviated record is before this Court, hence it is impossible to narrate the early proceedings which, according to Appellee's brief, began on September 12, 1991, with a complaint that the defendant, Martin, was utilizing certain described property for adult entertainment activities in violation of Section 17.64.270 of the Zoning Laws of the Plaintiff's city.

The present record begins with a memorandum filed by the Trial Judge on March 6, 1993, finding the defendants guilty of violating Section 17.64.270 by conducting adult entertainment within 500 feet of a school.

On March 17, 1993, the Trial Court entered an order stating:

> It is therefore ORDERED, ADJUDGED and DECREED that Defendants Ann Martin and AME, Inc., a Tennessee corporation, d/b/a/ Classic Cat II, are conducting adult

> entertainment commercial activities at 126 8th Avenue North, (Map and Parcel No. 93-64-3-13) in violation of Section 17.64.270 of the Metropolitan Code of Laws.
>
> It is further ORDERED, ADJUDGED and DECREED that Defendants Ann Martin and AME, Inc., a Tennessee corporation, d/b/a/ Classic Cat II, their respective officers, agents, representatives, employees and successors, and all other persons in active concert and participation with them, be and they hereby are permanently enjoined from conducting adult entertainment commercial activities at 126 8th Avenue North (Map and Parcel No. 93-6-3-13) in violation of Section 17.64.270 of the Metropolitan Code of Laws.

On December 5, 1994, the Supreme Court denied application to appeal from the judgment of this Court affirming the March 17, 1993, order of the Trial Court.

On June 26, 1995, the Plaintiffs instituted the present proceeding by filing a petition for contempt containing the following:

> That Section 17.04.150 of the Metropolitan Code of Law defined the activity type "adult entertainment" as follows:
>
> 17.04.150 Adult entertainment
>
> "Adult entertainment" means any adult bookstore, adult motion picture theater, adult mini-motion picture theater, or any commercial establishment which for a fee or incidentally to another service, presents material or exhibitions distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or specified anatomical areas," as defined below for observation by patrons therein.
>
> "Specified sexual activities" are defined in Section 17.04.1230 as follows:
>
> 17.04.1230 Specified sexual activities
>
> "Specified sexual activities" means:
>
> A. Human genitals in a state of sexual arousal;
> B. Acts of human masturbation, sexual intercourse or sodomy;

C. Fondling or other erotic touching of human genitals, public Region, buttock or female breast.

"Specified anatomical areas" are defined in Section 17.04.1220 as follows:

"Specified anatomical areas" means:

17.04.1220 Specified anatomical areas

A. Less than completely and opaquely covered:
1. Human genitals, public region;
2. Buttock; and
3. Female breast below a point immediately above the top of the areola; and
B. Human male genitals in a discernibly turgid state, even if completely and opaquely covered. (Prior Code Appx A § 12.10 (part)).

That on the evening of July 17, 1995, the Defendants, doing business as the Classic Cat in the location identified in Paragraph 1 above, presented for the observation of patrons an exhibition consisting of at least two dancers who were dancing wearing "G-strings" and clear plastic pasties on the areola, leaving the entire breast exposed. A third dancer was wearing only a G-string. The buttocks of these dancers were exposed. A similar exhibition was presented for observation on the evening of July 24, 1995. Furthermore, patrons were able to purchase private dances in which a dancer removed all clothing and engaged in acts of masturbation and simulated sex acts.

That the activities described in Paragraph 10 constitute "adult entertainment commercial activities" at 126 8th Avenue North in violation of Section 17.64.270 of the Metropolitan Code of Laws and in direct violation of this Court's order of March 17, 1993, enjoining Defendants from conducting such activities.

Wherefore, Plaintiffs pray for this court to find Defendants in contempt of this court and for the following relief:

a. To order the Defendants to appear before this court to show cause why they should not be held in contempt.

b. To order that Defendants' establishment, the Classic Cat, remain closed until such time as Defendants are able to establish to the Metropolitan Government that they are able to operate at their current location without conducting adult entertainment activities in violation of

Section 17.64.270 of the Metropolitan Code of Laws;

c. For other such relief as this Court deems appropriate.

The Defendants answered as follows:

> Come the defendants and in answer to the Petition for Contempt filed against them in the cause hereby deny that they are guilty of wilful contempt of the orders of this Court and further deny that there is any adult activity being conducted at 126 8th Avenue, North, Nashville, Davidson County, Tennessee, as defined by the Zoning Regulations of the Metropolitan Government.

The judgment of the Trial Court states:

> The evidence presented to this Court at the hearing on August 3, 1995, establishes that on two separate occasions Section 17.64.270 was violated in that the dancers on stage at the Classic Cat were wearing G-strings, there were bare breasts exposed, there were nude videos, and there were repeated VIP dances where the dancer was fully nude and engaged in specified sexual activities as that term is defined in Section 17.04.1230 of the Metropolitan Code.
>
> Given the circumstances described in Paragraph 2, the Court finds that the primary function of the defendant was an adult entertainment activity, that such activity had been permanently enjoined by Chancellor Brandt, that there was a violation of Chancellor Brandt's order, and that the defendants should therefore be held in contempt.
>
> The Court additionally determines that this contempt was willful, in that the law in question is published and is clear as to what comprises specific sexual activities and specified sexual areas.
>
> The Court additionally determines that the wearing of pasties results in a violation of the ordinance at issue in that they constitute a "less than completely and opaquely covered . . . . female breast below a point immediately above the top of the areola" as set forth in 17.04.1220.A.3. of the Metropolitan Code describing"specified anatomical areas." In so determining, the Court adopts the argument of Metro's legal counsel, finding that the phrase "below a point immediately above the top of the areola" modifies the term "breast," thus making clear that the breasts have to be

covered from the top of the areola on down.

In light of the above findings, it is therefore ORDERED, ADJUDGED and DECREED as follows:

1. That Defendants Ann Martin and AME, Inc. d/b/a Classic Cat are found to be in contempt of court.

2. That Defendants Ann Martin and AME, Inc. d/b/a Classic Cat cease and desist from the activities found by this court to be in violation of the March 17, 1993 injunction, including but not limited to the nude dancing, nude videos, and specified sexual activities.

3. That the Classic Cat be closed effective Friday, August 4, 1995, through closing time on Monday, August 7, 1995, to enable the Defendant to counsel its employees, to make any changes in attire that are necessary, to instruct employees, and to do so in order to assure that there will not be any violation of the order in the future.

On appeal, defendants present three issues, as follows:

1. Was the principal activity conducted by the defendant, AME, Inc., a violation of § 17.64.270 of the Metropolitan Code?

2. If the defendants violated § 17.64.270 of the Metropolitan Code, was the violation "willful?"

3. Did the trial court correctly interpret and apply § 17.04.1220.A.3 of the Metropolitan Code?

§ 17.64.270 of the Metropolitan Code reads as follows:

17.64.270 Restricted locations of adult entertainment establishments.

No establishment classified as an adult entertainment Activity shall be located within five hundred feet of any church, school ground, college campus or park, or within one hundred fifty feet of any other establishment classified under the category "adult entertainment"; and further, all such establishments shall be limited to one per block face. In determining the distance from a church, school ground, college

> campus, park or any other establishment classified under the category "adult entertainment," the distance shall be measured from property line to property line. However, a variance in these requirements may be requested of the board of zoning appeals in accordance with the provisions set forth in this title for appeals, only where the strict application of these requirements would result in practical difficulties or undue hardships upon the owner of the property. (Prior code Appx. A § 33.50)

Defendants point out that both the zoning ordinances and the injunction use the expression, "adult entertainment activities" and insist that an activity must be the principal activity on the premises in order to violate the zoning law.

In support of this insistence, defendants rely upon code section 17.04.140 which defines "activity" as "the performance of a function or operation which constitutes the use of the land." The evidence in this record leaves no doubt that the land in question was used in the performance of the activity constituting the grounds of this action.

Defendants also rely upon Code section 17.04.930 which states:

> Principal activity means an activity which fulfills a primary function of an establishment, institution, household or other entity.

Defendants' argument states:

> What is the primary function of the Classic Cat on or after July 17, 1965? According to the affidavit of Mr. Gonzalez, a 90% of the activity was not adult entertainment as that term is defined in the zoning regulations. Therefore, it was error for the trial court to find that the principal commercial activity was adult entertainment in violation of the zoning regulations and the 1993 order.

No citation indicates the location of such affidavit in the record, and no such affidavit is found. Other affidavits of this affiant are found which do not bear upon the issue at hand. Even if the missing affidavit should support the quoted argument, it would not affect the results, for it

is too general in tenor to defeat the conviction of contempt.

Defendants operate a "night club" which offers live and video entertainment and beverages. Each activity on the premises is calculated to attract patronage of the establishment hence it is an activity which "fulfills a primary function of the establishment" which is patronage and profit.

The mere fact that the objectionable activity was conducted by relatively few of the employees or for a relatively small fraction of the time would not prevent it from being a part of the principal activity of the business if it was calculated to attract patronage of the establishment.

Defendants next insist that there is no evidence that the defendant Ann Martin, violated the injunction. It is not questioned that Ms. Martin is one of the owners of the establishment and had the right and power to control activities on the premises. The injunction placed upon her the duty of preventing the premises from being used in violation of the zoning ordinance. She cannot avoid that duty by absenting herself or "looking the other way." Moreover, the judgment, quoted above, imposes no fine or imprisonment upon Ms. Martin. It's only sanction was against the establishment, interrupting operation for a few days.

Defendants next complain of "lack of direction" from city officials as evidence of "bad faith" and state that reliance upon advice of their counsel should be a "mitigating factor." Defendants do not suggest how the light sanction imposed by the Trial Court should be further mitigated.

Finally, defendants argue that the Trial Court erred in finding that the exposure of entertainer's bodily parts constituted a code violation. Code section 17.04.1220, quoted above, describes the prohibited exposure, and subsection A3 is the particular description at issue.

One of the requirements is that the covering be opaque, that is, "not transparent." It is obvious that a transparent covering does not satisfy the requirement of the zoning ordinance.

Defendants argue that the ordinance read literally, requires opaque covering of all parts of the body below the point designated in subsection 3. Since the section clearly forbids exposure of the parts involved in the present appeal, the issue as to what other parts are required to be covered is moot in this appeal.

Defendants suggest that it is unconstitutional to prohibit in a night club what is permitted on public beaches. This argument overlooks the fact that the present appeal involves what is permissible within 500 feet of a school. There is no evidence of a public beach within such proximity of a school.

Correspondingly, what is done at other places of entertainment outside the prohibited areas is irrelevant to the issues in this case.

The judgment of the Trial Court is affirmed. Costs of this appeal are taxed against the Defendants. The cause is remanded to the Trial Court for further proceedings.

Affirmed and Remanded.

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HENRY F. TODD, PRESIDING JUDGE

CONCUR:

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SAMUEL L. LEWIS, JUDGE

CONCURS WITH RESULT:

WILLIAM C. KOCH, JR., JUDGE