IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA.

HAROLD I. ETTINGER,

Appellant,

v.

CITY OF WEST PALM BEACH,

Appellee.
_____/

CIVIL APPELLATE DIVISION "AY"
CASE NO. 502008CA040059XXXXMB

Opinion filed: January 29, 2010

Appealed from the Code Enforcement Board of the City of West Palm Beach, Florida

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PER CURIAM

REVERSED.

The Appellant, HAROLD I. ETTINGER appealed an order of the Code Enforcement Special Magistrate of the CITY OF WEST PALM BEACH ("City") entered on November 19, 2008. The order found Ettinger in violation of Section 105.1 of the Florida Building Code ("the Code"), which requires a homeowner to secure various permits before undertaking certain construction projections on his or her property.[1] This court has jurisdiction pursuant to § 162.11, Florida Statutes. For the reasons set forth below, we find that the Special Magistrate departed from the essential requirements of law, and reverse.

[1] The Florida Building Code is adopted by reference by Section 18-31 of the City of West Palm Beach Code of Ordinances.

Ettinger is the owner of a condominium located at the Palm Beach House Condominiums in West Palm Beach, Florida ("residence"). On or about September 7, 2008, the West Palm Beach Fire Department was called to the residence after Ettinger inadvertently ignited some wall insulation while working on the pipes in the shower. The following day, per City's standard operating procedures, a building inspector from City's Construction Services Department visited the residence to determine whether there had been any structural damage as a result of the fire. The inspector did not obtain a warrant prior to his arrival at the residence. At the time of the inspector's arrival, Ettinger was not at home and thus could not consent to any entry by the inspector; nor did Ettinger empower a third party to permit entry to the unit in his absence. The inspector was subsequently granted entry to the unit by the building manager and proceeded to conduct his post-fire examination of the residence. The inspector determined that remodeling work was done in the bathroom of the unit and in other areas of the residence without the requisite permits as mandated per the Code. The inspector took several photographs of the non-permitted work in the bathroom as well as in other areas of the residence, although nothing in the record indicates that the fire spread to any area of the residence other than the bathroom.

On October 8, 2008, approximately one month after the inspector's initial post-fire investigation, the residence was cited for failure to secure a permit in violation of Section 105.1 of the Code. On October 9, 2008, a Notice of Violation was sent to Ettinger, demanding that he obtain permits for the non-permitted work and alerting him that a failure to correct the violations by November 14, 2008 would result in the presentation of the matter to a Special Magistrate. Ettinger did not correct the violations and a hearing was subsequently held on the matter on November 19, 2008. At the hearing, Ettinger did not contest City's assertion that the alleged conditions existed in his unit nor did he deny that he neglected to obtain any of the requisite

permits prior to beginning the work. Rather, Ettinger objected solely to City's warrantless post-fire inspection of September 8, 2008, which produced the totality of the evidence used against him at the hearing. Over Ettinger's objection, the Special Magistrate found Ettinger in violation of the Code and ordered him to obtain permits for the work within 90 days or face daily fines of $100 per day. This timely appeal followed.

Where a party is entitled as a matter of right to seek review in the circuit court from administrative action, the circuit court must determine (1) whether procedural due process was accorded; (2) whether the essential requirements of the law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. See City of Deerfield Beach v. Vaillant, 419 So. 2d 624 (Fla. 1982); Haines City Community Development v. Heggs, 658 So. 2d 523 (Fla. 1995).

Ettinger argues that (1) City's entry into his unit and the subsequent investigation therein constituted an unlawful warrantless search[2]; and (2) that any evidence gathered during the inspection was therefore barred from consideration in a subsequent proceeding. As such, Ettinger argues that the Special Magistrate's sole reliance on the information obtained during the search in question amounted to a violation of fundamental due process. The City in turn argues that the Fourth Amendment's warrant requirements did not apply in this instance; and even if such constraints did apply, a warrantless search was nevertheless appropriate under the circumstances.

The Fourth Amendment's warrant requirements are applicable in administrative searches of this nature. See Camara v. Municipal Court of San Fransisco, 387 U.S. 523 (1967); See v. Seattle, 387 U.S. 541 (1967); Marshall v. Barlow's Inc., 437 U.S. 307, 312 (1978). See also, Fla. Dep't. of Agric. v. Haire, 836 So. 2d 1040 (Fla. 4th DCA 2003) (holding that *Camara* and *See* dictate the Fourth Amendment's applicability with regard to administrative searches in Florida);

[2] *See* U.S. Const. amend. IV; Fla. Const. art. I, § 12 (2009).

Roche v. State, 462 So. 2d 1096 (Fla. 1985) ("[w]hen a regulatory or administrative scheme requires searches of a private premises in order to effectuate its goal, a citizen may demand a warrant...") (interpreting *Camara*). Taken together, these cases clearly establish that there is a presumption of unreasonableness and/or invalidity with regard to any nonconsensual, warrantless search of a private residence by a governmental or municipal agent. Consequently, the inspection at issue amounts to an unreasonable search under the Fourth Amendment "unless some recognized exception to the warrant requirement applies..." Marshall, 437 U.S. at 313. In its brief, City puts forth three basic arguments as to why the post-fire search of September 8, 2009 was not improper.

First, City asserts that because the inspection was conducted following a fire, the inspector's entry to the residence is necessary in order to protect the general welfare by ensuring that there has been no structural damage to the unit or building. In order for a warrantless post-fire inspection of a private residence to be valid in this instance, however, the search must be necessary to prevent immediate harm from rekindling. Michigan v. Clifford, 464 U.S. 287, 292-93 (1984) (holding that where objectively reasonable privacy interests remain in the fire-damaged property, the warrant requirement applies, and any official entry must be made pursuant to a warrant in the absence of consent or the finding of a new exigency). Here, City admits that the purpose of the inspection was to search for structural defects that resulted from the fire and not to determine the source or cause of the blaze in order to prevent rekindling. In addition, the inspection took place a full day after the fire had been extinguished, which is a clear indication that there was no immediate danger of a future fire hazard. Furthermore, the inspector's search cannot be classified as a continuation of the valid warrantless entry by the fire department due to the significant lapse of time in between the two events. See id., at 296

(holding that an investigator was required to obtain a warrant because a lapse of five and a half hours between the departure of first responders and the commencement of the post-fire investigation was too much time for the investigation to be deemed a continuation of a valid warrantless search).

Second, City argues that the building manager's decision to unlock Ettinger's residence constituted sufficient consent to enter the premises. The consent exception to the Fourth Amendment, however, provides that a third party may only consent to a search if he or she possesses "common authority" over the premises. Illinois v. Rodriguez, 497 U.S. 177, 181 (1990); United States v. Matlock, 415 U.S. 164, 171 (1974) (defining "common authority" as the "mutual use of property by persons generally having joint access or control for most purposes."). A third party whose interest is limited simply to managerial duties in a property thus does not similarly enjoy common authority over the property with the owner or tenant. See Rodriguez, 497 U.S. at 181 (holding that possession of a key is not sufficient to show common authority); Chapman v. United States, 365 U.S. 610, 617 (1961) (holding that a landlord does not have the authority to properly consent to a warrantless search of a tenant's residence). Moreover, the inspector could not have reasonably believed that the building manager possessed such common authority in order to invoke the exception for a mistaken belief of authority to consent. Rodriguez, 497 U.S. at 188. As such, the Fourth Amendment's third party consent exception is inapplicable here because there is no competent, substantial evidence to support a finding that the third possessed common authority over the premises. The building manager's "consent" neither obviated the need for an administrative warrant nor rendered the Fourth Amendment inoperable in this instance.

Finally, City argues that Fla. Stat. sec. 718.111 compels condo residents to permit entry in this instance. Section 718.111(5), however, requires condominium owners to provide *the association* access to their units for repair and maintenance. There is no requirement that they permit access to state or municipal officials for this or any other purpose. Essentially, City argues that because Ettinger has the responsibility to provide the association access to his unit, he must also permit entry to any party the association wishes to admit as well. The statutes regarding Ettinger's duty to permit entry, however, clearly extend only to the association and its designated agents.[3] In this instance, the inspector was not working on behalf of the association; rather, he was working on behalf of City. Moreover, any statute that permits a warrantless search when a warrant would ordinarily be required is unconstitutional. Marshall, 437 U.S. at 310. Therefore, any interpretation of the applicable Florida Statutes that would empower a warrantless search under circumstances not recognized by the Supreme Court would amount to an untenable and unconstitutional interpretation of the statute.

Based on the foregoing, this Court finds that the Special Magistrate departed from the essential requirements of the law by allowing City to submit information gathered from the unlawful search of Ettinger's residence. Such a departure amounted to a violation of Ettinger's right to fundamental due process under Fla. Stat. § 162.07(3). State v. Thomas, 405 So. 2d 462, 463 (Fla. 3d DCA 1981) (holding that when a search is declared to have been unconstitutionally effected, "it is clear that the tangible items must be suppressed as fruit of the poisonous tree."); See also, Kupke v. Orange County, 838 So. 2d 598 (Fla. 5th DCA 2003) (interpreting the due process requirements of Fla. Stat. § 162.07(3)). Further, without the information obtained from

[3] Although neither party made reference to the possibility in the respective briefs, the bylaws of a homeowners' association generally require residents to cede certain rights to the HOA. It is possible that a provision of Ettinger's HOA by-laws does in fact authorize building management to permit entry to police and executive officers, but there is no evidence in the record that such is the case here.

the unconstitutional search of Ettinger's residence, there exists no competent substantial evidence to support the findings of the Special Magistrate. Therefore, the judgment of the court below is **REVERSED.**

Ettinger's Motion for Appellate Attorney Fees and Costs is **DENIED**. Appellate costs shall be taxed by the *lower tribunal* on motion served within 30 days after issuance of the mandate. Fla. R. App. P. 9.400(a). Ettinger is not entitled to attorney's fees pursuant to Fla. Stat. § 162.07(2) ("if the *local governing body prevails* in prosecuting a case before the enforcement board, it shall be entitled to recover all costs incurred...") (emphasis added).

ROSENBERG, FRENCH, and GARRISON, JJ. concur