

Constitutionality of C.C.C. 4509.07

As a matter of first impression, the Court will assess the constitutionality of C.C.C. 4509.07. The text of C.C.C. 4509.07 reads, in pertinent part:

- a) No owner . . . shall institute or threaten to institute any action to recover possession of the premises or otherwise cause a tenant to quit a habitation involuntarily, demand an increase in rent from a tenant, decrease services to which a tenant has been entitled, increase the obligations of a tenant, or refuse to renew the tenant's lease agreement in retaliation against:
 - 1) A tenant's good faith complaint or report of conditions in, or affecting his dwelling unit, which might reasonably be believed to constitute a violation of a housing, building, health, or other code or ordinance made to a governmental authority or to the owner or person having control of the premises
- b) The City of Columbus bears the initial burden of establishing a prima facie case of retaliatory action. In order to establish a prima facie case, the City must demonstrate the following:
 - 1) The victim is a "tenant" as defined by C.C.C. Section 4501.405.
 - 2) The tenant has engaged in one of the protected activities in C.C.C. Section 4509.07(a).
 - 3) The owner or person having control of the premises has engaged in at least one of the following prohibited actions: . . .
 - v. Termination or non-renewal of a lease agreement in close temporal proximity to the occurrence of any event referred to in C.C.C. Section 4509.07(a)
- c) Once the City has established a prima facie case, a rebuttable presumption shifts the burden to the owner, or person having control of the premises, to articulate a legitimate, non-retaliatory reason for taking action against the tenant. To rebut the presumption to any prosecution brought under C.C.C. Section 4509.07(a) that the actions taken by the owner, or person having control of the premises were retaliatory, the accused must demonstrate by preponderance of the evidence either of the following:
 - (i) A tenant's violation of the lease agreement between the tenant and the accused; or
 - (ii) A reason not related to the tenant's good faith complaint or report to the accused or a governmental authority.

If the accused articulates such a reason, the presumption ceases and the City bear the burden of proving the proffered reason is merely a pretext for unlawful retaliation.

Defendant argues that C.C.C. 4509.07 "is unconstitutional, as it shifts the burden of proving the element of intent onto the Defendant in violation of his Due Process rights." The City concedes that C.C.C. 4509.07(c) is unconstitutional, but argues that "this section can be severed to allow the rest of the statute to remain intact." According to the City, "Sections (a) and (b) of C.C.C. 4509.07 are valid and establish a case which the City must prove beyond a reasonable doubt."

The Court agrees with the parties that section (c) unconstitutionally shifts the burden to the defendant. "The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects the defendant from conviction except upon proof beyond a reasonable doubt of 'all of the elements

included in the definition of the offense of which the defendant is charged.” *State v. Ireland*, 155 Ohio St. 3d 287, 2018-Ohio-4494, 121 N.E.3d 285, ¶ 38, citing *Patterson v. New York*, 432 U.S. 197, 210, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). “[T]he Due Process Clause prohibits states from requiring an accused to disprove an element of the crime charged” *Id.* at ¶ 40, citing *Mullaney v. Wilbur*, 421 U.S. 684, 704, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). “[P]ursuant to *Patterson* and *Mullaney*, the state may properly place the burden of proving affirmative defenses on a defendant, but the state may not presume that an element of a crime exists as a result of given conduct and then place the burden of showing otherwise on the defendant.” *State v. Furman*, 11th Dist. No. 2001-L-213, 2003-Ohio-2100, ¶ 28. Here, “in retaliation against” is an element of Retaliatory Action, which should be proven by the City beyond a reasonable doubt. However, C.C.C. 4509.07, as written, does not require that. Section (c) runs afoul the Due Process Clause by requiring the Defendant to disprove retaliatory intent following the City’s prima facie showing outlined in section (b).

The City argues that although section (c) is unconstitutional that it can be “severed from the rest of C.C.C. 4509.07” and that “the provisions and requirements of C.C.C. 4509.07(a) and (b) may remain as long as they do not run afoul any restriction, constitutional or otherwise.” C.C.C. 101.04 provides that “[e]ach section and each part of each section of the city codes is . . . an independent section or part of a section . . . if any such section . . . is held to be invalid, the remaining sections or parts of sections . . . shall not be affected thereby” The Court’s own research, nor the parties, produced any cases actually applying C.C.C. 101.04¹; however, this section is analogous to R.C. 1.50 which provides that “if any provisions of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable.” Since 1927, the Supreme Court of Ohio has applied the following three-part test to determine whether an invalid portion of a statute can be severed pursuant to R.C. 1.50 or if the entire law must be struck down:

- (1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself?
- (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out?
- (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?

¹ The only citation to C.C.C. 101.04 this Court’s research produced is Judge Whiteside’s dissent in *City of Columbus v. Gifford*, 10th Dist. Nos. 76AP-684, 76AP-685, and 76AP-686, 1977 Ohio App. LEXIS 7337. There, Judge Whiteside notes that C.C.C. 101.04 “expressly provide[s]” for the severance of parts of a city code, but he provides no guidance as to how to determine what can be severed.

State v. Noling, 149 Ohio St. 3d 327, 335, 2016-Ohio-8252, ¶ 34, 75 N.E.3d 141, 151, citing *Geiger v. Geiger*, 117 Ohio St. 451, 466, 5 Ohio Law Abs. 829, 160 N.E. 28 (1927). “A portion of a statute can be excised only when the answer to the first question is yes and the answers to the second and third questions are no.” *Id.* at ¶ 35, citing *State v. Romage*, 138 Ohio St.3d 390, 2014-Ohio-783, 7 N.E.3d 1156, ¶ 16. The Court finds this test of severability highly instructive.

First, the Court will consider whether section (c) and sections (a), (b), (d), (e), and (f) are capable of separation so that each may be read and may stand by itself. C.C.C. 4509.07(b) instructs that the City “bears the initial burden of establishing a prime facie case of retaliatory action” by demonstrating that the victim is a tenant, that the tenant engaged in a protected activity, and that the defendant engaged in at least one of ten “prohibited actions.” Section (c)—which the parties agree is unconstitutional—then shifts a rebuttable presumption to the defendant to articulate a legitimate, non-retaliatory reason for taking action against the tenant. In *Cleveland v. State*, the Supreme Court of Ohio found that each sentence of a two sentence section could stand by itself because neither of the sentences was dependent on the other for any of its meaning. *Cleveland v. State*, 138 Ohio St.3d 232, 2014-Ohio-86, 5 N.E.3d 644, ¶ 20. Section (b) could not stand independently if section (c) were severed; without section (c), the code stops with the City’s “initial burden” in section (b) which does not require that the City prove retaliatory intent, an essential element of this offense. The court finds that the answer to the first *Geiger* question is no.

Next, the Court will consider whether part (c) is so connected with the general scope of the code as to make it impossible to give effect to the apparent intention of Council if section (c) is stricken out. In 2018, Columbus City Council passed Ordinance 3316-2018, which amended C.C.C. 4509.07 specifically to add the burden shifting language the City now concedes is unconstitutional.² In the explanation section of the ordinance, Council said:

This ordinance is intended to update and clarify retaliatory eviction criminal code section for the City of Columbus. City agencies have expressed to City Council that the existing law is outdated and difficult to enforce due to lack of definitions as well as a lack of a burden-shifting scheme which would provide guidance to the City, tenants, landlords and the court.

It is clear to the Court that Council’s intention when adding section (c) was to assist the City and the Court in enforcing Retaliatory Action. Meaning, if section (c) is stricken from the code, Council’s intention cannot come to fruition because the code would be left in the same “outdated and difficult to enforce” state it was in before the 2018 amendment that added section (c). Because section (c) was crucial to Council’s intent when amending this code section, the Court finds that it would be impossible to give effect to

² This amendment also added section (b), which explains how the City is to establish a prima facie case of retaliatory action.

Council's intent if section (c) was stricken. The court finds that the answer to the second *Geiger* question is yes.

Last, the Court will consider whether the insertion of words or terms necessary in order to separate sections (a), (b), (d), (e), and (f) from section (c), and to give effect to the former only.

As explained above in response to the first *Geiger* question, without part (c) this code requires no proof whatsoever as to retaliatory intent. Meaning, words would need to be inserted into this code to give effect to the remaining sections—to require proof all elements of the offense—if section (c) were removed. The court finds that the answer to the third *Geiger* question is yes.

Conflict with General State Law

Defendant argues that C.C.C. 4509.07 “is unconstitutional as it conflicts with a general law of the state relating to retaliatory evictions.” The City argues that C.C.C. 4509.07 and R.C. 5321.02, which prohibits retaliatory evictions and provides tenants with a civil remedy against retaliatory landlords, “work in tandem, not in conflict.”

Because the Court found that C.C.C. 4509.07 is unconstitutional as outlined above, the Court need not decide the Home Rule issue.

Conclusion

Preventing evictions for retaliatory purposes is a noble and worthwhile goal. Defense counsel even acknowledged this during oral arguments. Ideally, every citizen of Columbus should be afforded access to safe and decent housing, and they should not fear retribution when insisting that their housing be up to our community's standards. Although it can often be a lopsided relationship, a properly constructed statute could benefit both landlords and tenants. Unfortunately, the latest changes to the C.C.C. do not provide this framework. The task of salvaging the remaining code sections without part (c), which the City itself admits is unconstitutional, is just not feasible.

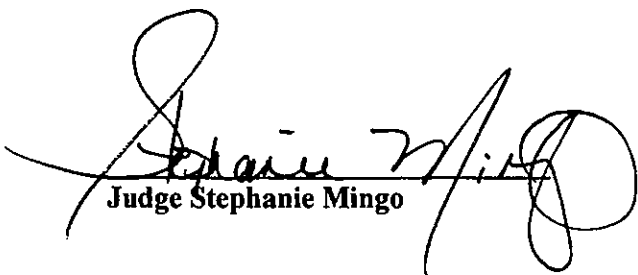
For the above stated reasons, Defendant's motion to dismiss is **GRANTED**, and this case is **DISMISSED**.

This is a final, appealable order.

The Clerk is directed to serve notice of this Decision & Entry upon the parties.

SO ORDERED.

11-23-2021
Date


Judge Stephanie Mingo