Fields v Village of Sag Harbor
2007 NY Slip Op 31699(U)
June 18, 2007
Supreme Court, Suffolk County
Docket Number: 0020949/2005
Judge: William B. Rebolini
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SHORT FORM ORDER

INDEX No. 05-20949

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM B. REBOLINI
Justice of the Supreme Court

MOTION DATE 11-17-05
ADJ. DATE 2-2-07
Mot. Seq. # 003 - MotD
004 - XMD

PARIS FIELDS,

Plaintiff,

- against -

VILLAGE OF SAG HARBOR and EDWARD DEYERMOND, individually and as the Mayor of the Village of Sag Harbor,

Defendants.

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Upon the following papers numbered 1 to 27 read on this motion by defendants for summary judgment dismissing the complaint; and on this cross motion by plaintiff for summary judgment against defendants and to strike defendants' first, second, third and sixth affirmative defenses; Notice of Motion/ Order to Show Cause and supporting papers 1-6 ; Notice of Cross Motion and supporting papers 7-23 ; Answering Affidavits and supporting papers 24-25 ; Replying Affidavits and supporting papers 26-27 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants for an order granting defendant's summary judgment dismissing the complaint is granted to the extent that the complaint as to Edward Deyermond, individually and as Mayor of the Village of Sag Harbor, is dismissed in its entirety and the second cause of action in the complaint seeking damages for negligence, gross negligence and negligent and intentional infliction of emotional distress is dismissed and the demand for punitive damages as to the Village of Sag Harbor is dismissed; and it is further

ORDERED that the cross motion for summary judgment is denied.

Plaintiff Paris Fields ("plaintiff") is the owner of commercial property at 24-27 Washington Street which he purchased in November 2002 and residential property at 314 Main Street in the Village of Sag Harbor (the "Village"). Plaintiff is also a member of the Board of Architectural Review and Historic Preservation of the Village of Sag Harbor (the "Board").

On September 16, 2004, plaintiff filed a verified notice of claim, alleging that defendants have harassed him and attacked him, demanded that he resign from the Board "and other actions with regard to claimant's property and other illegal actions against the claimant" In his notice of claim, plaintiff asserts that defendants' conduct is discriminatory (first claim in the notice of claim), violates the State Constitution and

42 USC § 1983 (second claim) and is an abuse of governmental authority (third claim). Plaintiff also asserts that defendants' conduct has damaged his reputation and business and caused him mental anguish and suffering and other harm for which he seeks monetary damages. After a 50-h hearing was held, plaintiff commenced the instant action alleging that defendants, under color of law and pursuant to custom, practice, policy and procedure, subjected plaintiff to a continuous course of conduct of harassment and invidious discrimination which violates his constitutional and civil rights (first cause of action) and which constitutes negligence, gross negligence and negligent and intentional infliction of mental and emotional distress (second cause of action). Plaintiff contends that shortly after being appointed to the Board in June 2003, he became aware of the impending demolition of the Bulova Watch Factory, a local historic and national landmark property. In his capacity as a member of the Board and resident of the Village, plaintiff states that he contacted the media in a good faith effort to generate public opposition to the demolition. While not set forth in the notice of claim, plaintiff offers the foregoing as the reason for defendant's alleged conduct.

In their answer, defendants deny the material substantive allegations in the complaint and assert, among other things, that plaintiff failed to comply with sections 50-e, 50-h and 50-I of the General Municipal Law ("GML") (first affirmative defense), the expiration of the statute of limitations (second affirmative defense), that the claims are violative of public policy (third affirmative defense), and the governmental immunity bar (sixth affirmative defense). Defendants now move for summary judgment dismissing the complaint on the grounds that the second cause of action for negligence, gross negligence, and negligent and intentional infliction of emotional distress was not identified in the notice of claim as required by the General Municipal Law and is now time-barred. Additionally, defendants argue that the first cause of action should be summarily dismissed inasmuch as plaintiff has not demonstrated that he has been deprived of a constitutionally-protected right. Furthermore, defendants maintain that plaintiff is not entitled to punitive damages.

General Municipal Law § 50-e provides that claims against a municipality are required to be filed within 90 days of the incident giving rise to the claim. The point of the notice of claim is to ensure that the municipal authority is given enough information about the incident to conduct a timely investigation and evaluate the merit of a claim (***Brown v City of New York***, 95 NY2d 389, 718 NYS2d 4 [2000]). Although evidence adduced during a 50-h hearing can rectify deficiencies in a notice of claim, information supplied at the hearing may not be used to amend the theory of liability which would change the nature of the claim as set forth in the notice of claim (***Figueroa v New York City Hous. Auth.***, 271 AD2d 238, 707 NYS2d 37 [2000]; ***Mazzilli v City of New York***, 154 AD2d 355, 545 NYS2d 833 [1989]). Thus, a cause of action for which a notice of claim is required which is not referred to, either directly or indirectly in the plaintiff's original notice of claim, may not be alleged in the complaint (*see,* ***Trowell v New York City Health & Hosps. Corp.***, 305 AD2d 583, 759 NYS2d 357 [2003]; ***Mazzilli v City of New York***, *supra*). Since the notice of claim does not set forth any allegations with respect to Edward Deyermond, either individually or in his official capacity, the complaint is dismissed in its entirety as to Deyermond "...on the ground that plaintiff failed to comply with a condition precedent to the commencement of the action..." (Santoro v. Town of Smithtown, __AD3d_, 2007 WL 1365401 [2d Dept. May 2007]). In addition, as plaintiff's notice of claim does not refer to any acts of negligence or gross negligence on the part of any of the defendants, the second cause of action containing such allegations must be dismissed as to the Village of Sag Harbor as well (*see,*

***Trowell v New York City Health & Hosps. Corp.**, supra*).

In any event, plaintiff's complaint fails to state a cause of action for negligence. It is well settled that a municipality is immune from negligence claims arising out of the performance of its governmental functions unless the injured person establishes a special relationship with the municipality which would create a concomitant special duty of protection (***De Long v County of Erie***, 60 NY2d 296, 469 NYS2d 611 [1983]; ***Motyka v City of Amsterdam***, 15 NY2d 134, 256 NYS2d 595 [1965]; ***Gonzalez v County of Suffolk***, 228 AD2d 411, 643 NYS2d 651 [1996]). The elements of a special relationship are "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking" (***Cuffy v City of New York***, 69 NY2d 255, 260, 513 NYS2d 372 [1987]). Here, plaintiff neither pleads nor has alleged any facts to demonstrate that a special relationship exists with the defendants. Consequently, the claims sounding in negligence cannot be sustained.

Furthermore, assuming, without concluding that the notice of claim provided enough information to enable defendants to investigate and evaluate the merits of a cause of action for intentional or negligent infliction of emotional distress, such cause of action is barred by public policy and cannot be sustained against a governmental entity (***Wyllie v District Attorney of County of Kings***, 2 AD3d 714, 770 NYS2d 110 [2003]; ***Liranzo v New York City Health & Hosps. Corp.***, 300 AD2d 548, 752 NYS2d 568 [2003]; *see also,* ***Moore v Melesky***, 14 AD3d 757, 788 NYS2d 679 [2005]). Moreover, the complaint fails to state a cause of action for either intentional or negligent infliction of emotional distress as the acts allegedly committed by the defendants neither rise to the level of extreme and outrageous conduct (***Kasachkoff v City of New York***, 68 NY2d 654, 505 NYS2d 67 [1986]; ***Liranzo v New York City Health & Hosps. Corp.**, supra)* nor constitute a breach of a duty that unreasonably endangered plaintiff's physical safety (***Moore v Melesky**, supra*).

It is also well settled that punitive damages cannot be assessed against a governmental entity because ultimately innocent taxpayers would be punished (*see,* ***Clark-Fitzpatrick Inc v Long Is. RR Co.***, 70 NY2d 382, 521 NYS2d 653 [1987]; ***Sharapata v Town of Islip***, 56 NY2d 332, 452 NYS2d 347 [1982]). Hence, the branch of defendants' motion which seeks summary dismissal of the second cause of action and the demand for punitive damages must be granted.

The court will now address the viability of the first cause of action in the complaint. Defendants argue that the complaint is devoid of any facts to suggest that plaintiff was deprived of any constitutionally protected rights or privileges, and that the plaintiff's conclusory averments fail to identify a protected interest under 42 USC § 1983. Moreover, defendants argue, plaintiff has not demonstrated that the Village maintained an official policy or custom which subjected plaintiff to denial of a constitutional right. Therefore, defendants maintain, plaintiff's first cause of action is substantively without merit and should be summarily dismissed.

In opposition and in support of his cross motion, plaintiff contends that he has sufficiently identified a constitutionally protected civil right with regard to property ownership, possession use and occupancy.

Plaintiff argues that defendants have interfered with these rights without due process and in violation of the equal protection laws by failing to issue a certificate of occupancy for his commercial property, erroneously applying a new zoning law to his commercial property, and by selectively enforcing sections of the Village Code against him which have not been enforced against similarly situated property owners.

In any 42 USC § 1983 action, the essential elements are whether "the conduct complained of was committed by a person acting under color of state law...and whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States" (***Bower Assocs. v Town of Pleasant Valley***, 304 AD2d 259, 262, 761 NYS2d 64 [2003], *affd* 2 NY3d 617, 781 NYS2d 240 [2004]). "In the land-use context, 42 USC § 1983 protects against municipal actions that violate a property owner's rights to due process, equal protection of the laws and just compensation for the taking of property under the Fifth and Fourteenth Amendments to the United State Constitution" (*id.*, at 2 NY3d 617, 626). A § 1983 claim "is not an additional vehicle for judicial review of land-use determinations" and, thus, the denial of a permit "is not tantamount to a constitutional violation" under this statute (*id.*, at 627). Nevertheless, in limited circumstances, a protected property interest may include the right to use one's land in a certain way. In such cases a "'right, such as a right to a permit or a change in zoning, may constitute a protected property right, the denial of which implicates the protections of the due process clause" (***Vertical Broadcasting, Inc. v Town of Southampton***, 84 F Supp 2d 379, 391 [EDNY 2000]; ***RRI Rlty. v Incorporated Vill of Southampton***; 870 F2d 911, 915 [2d Cir 1989]). Such a property right exists, however, only if the plaintiff can show a clear entitlement to the relief sought; a mere abstract need, desire or expectation is insufficient (***Natale v Town of Ridgefield***, 170 F3d 238, 263 [2d Cir 1999]; ***RRI Rlty. v Incorporated Vill of Southampton***, *supra*; ***Town of Orangetown v Magee***, 88 NY2d 41, 643 NYS2d 21 [1996]). A legitimate claim of entitlement can exist only where there is "a certainty or very strong likelihood" that an application would have been granted (***Bower Assocs. v Town of Pleasant Valley***, *supra,* 2 NY3d at 628, *quoting* ***Harlen Assoc. v Incorporated Vil. F Mineola***, 273 F3d 494, 504 [2d Cir. 2001]). "If the issuing authority has discretion in approving or denying a permit, a clear entitlement can exist only when that discretion 'is so narrowly circumscribed that approval of a proper application is virtually assured' " (*id.,* at 628, *quoting* ***Village Pond, Inc. v Town of Darien***, 56 F3d 375, 378 [2d Cir 1995]).

Due process has both a procedural and substantive component. In a procedural due process claim, the deprivation by a municipality of a constitutionally protected interest in... property, is not in itself unconstitutional; what is unconstitutional is the deprivation of such interest without due process of law" (***Zinermon v Burch***, 494 US 113, 125 [1990]). Procedural due process requirements are generally satisfied where the denial of plaintiff's request is preceded by notice and a hearing and followed by a written explanation (***Natale v Town of Ridgefield***, 170 F.3d 238 [2d Cir 1999]). Substantive due process rights are violated only by conduct "so outrageously arbitrary as to constitute a gross abuse of governmental authority" (*id.*, at 263; *see,* ***Bower v Town of Pleasant Valley***, 2 NY3d, *supra*).

Here, there is no dispute that the actions taken by the defendants were under color of state law. However, plaintiff has not shown a clear right to a constitutionally protected property interest, i.e., the right to the issuance of a certificate of occupancy (*see,* ***Bower Assocs. v Town of Pleasant Valley***, *supra; see, also,* ***Zahra v Town of Southold***, 48 F3d 474 [2d Cir 1995]; *cf.,* ***Town of Orangetown v Magee***, 88 NY2d 41, 643

NYS2d 21 [1996]). Moreover, "[t]here is no right to an existing classification of one's property" (***Orange Lake Assocs., Inc. v Kirkpatrick***, 21 F3d 1214, 1215 [2d Cir 1994]). Nor are there any assurances that zoning regulations will remain unchanged (***Sag Harbor Port Assocs. v Village of Sag Harbor***, 21 F Supp 2d 179 , 183-84 [EDNY 1998], *affd* 182 F.3d 901 [2n Cir 1999]). Assuming, arguendo, that plaintiff had a constitutionally protected property interest, because his allegations regarding the defendants' conduct are based on random, unauthorized intentional acts by the Village's employees, i.e., the Building Inspector and the Mayor, the Due Process Clause of the Fourteenth Amendment is not violated as the State provides a postdeprivation remedy through a CPLR Article 78 proceeding (*see,* ***Beechwood Restorative Care Ctr. v Leeds***, 436 F.3d 147 [2d Cir 2006]); *see,* ***Brady v Town of Colchester***, 863 F2d 205 [2d Cir 1988]).

Furthermore, plaintiff has not established a violation of his substantive due process rights. Defendants' alleged conduct does not raise to the level of being so egregious as "to be arbitrary in the constitutional sense" and thus "wholly without legal justification" (***Bower v Town of Pleasant Valley***, 2 NY3d, *supra* at 627-628).

Plaintiff's allegations and the evidence submitted are, however, sufficient to raise issues of fact as to whether his rights to equal protection have been violated by defendants' actions. "The basic guarantee of the Equal Protection Clause is that government will act evenhandedly in allocating the benefits and burdens prescribed by law and will not, without at least a rational basis, treat similarly situated persons differently or disparately" (***Weaver v Town of Rush***, 1 AD3d 920, 921, 768 NYS2d 58 [2003]). "Indeed, the purpose of the Equal Protection Clause 'is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents' of the government" (***Weaver v Town of Rush,*** *supra* at 921-922, *quoting* ***Village of Willowbrook v Olech***, 528 US 562, 564 [2000]).

The case at bar is strikingly similar to ***Weaver v Town of Rush*** (*supra*). The plaintiff in ***Weaver***, like the plaintiff herein, alleged that defendants' conduct in seeking to enforce inapplicable building codes and certificate of occupancy requirements, harassing and otherwise interfering with the enjoyment of property rights, was a denial of equal protection. In ***Weaver***, the Appellate Court found that plaintiff's allegations fairly implied that "similarly situated property owners are not subject to such treatment and that defendants lacked a rational basis for their disparate treatment of plaintiff." Such allegations, the Appellate Court held, adequately state an equal protection claim. The same result is warranted here.

On January 14, 2004, plaintiff leased a portion of the commercial property to a tenant for the operation of a yoga studio. According to the Building Inspector, as the records for the Village's Building Department listed the use of the space as a "business (store)," the yoga studio constituted a change in use to an "exercise studio." Thus, according to the Building Inspector, pursuant to Village Code §§ 55-16.1 and 16.2, site plan approval was required for the yoga studio, and pursuant to § 55-11.6, as amended by Local Law No. 1 of 2004, additional off-street parking was required. By letter dated June 9, 2004 from the Building Inspector, plaintiff was notified that he had not complied with off-street parking requirements in connection with the change of use of the commercial property from a retail business to an exercise studio. Thereafter, on June 25, 2004, plaintiff was notified by the Building Inspector that he was in violation of Village Code

§ 55-18.3(A) which provides that it is unlawful to use any building as to which there has been a change of ownership or change of use until a certificate of occupancy has been obtained by the owner.

At some point, plaintiff requested an updated certificate of occupancy for his commercial property. The form for obtaining the certificate of occupancy for change of use, plaintiff contends, indicates that a current survey must be submitted, not the site plan demanded by the Building Inspector. Plaintiff contends that the site plan is more costly to obtain, and has not been filed by any other exercise studio in the Village. Moreover, plaintiff argues, Village Code § 55-16.1D applies to "land use" and "redevelopment" and refers to grading, flood protection, pedestrian access and driveways. The spaced leased for the operation of a yoga business is less than one thousand square feet, was not being redeveloped, and thus, plaintiff argued to the Building Department and the Inspector that § 55-16.1 and § 16.2 were not applicable to the yoga business. Plaintiff, thus, requested the Building Inspector to revise his interpretation of the Village Code. Additionally, according to plaintiff, other exercise studios in the Village were not subject to the same requirements with regard to filing a site plan review and maintained that if he was the only property owner required to do so, there was the appearance of selective enforcement.

By letter dated March 22, 2005, the Building Inspector denied the request and reiterated that a revised certificate of occupancy could not be issued until plaintiff received site plan approval and provided adequate parking or applied for a variance from the parking regulations. On April 7, 2005, pursuant to Village Code § 55.14.4A, plaintiff submitted an appeal to the Zoning Board of Appeals ("ZBA") alleging that the Building Inspector erred in refusing to issue the revised certificate of occupancy for his commercial property.

Pursuant to plaintiff's request, the ZBA voted to adjourn his application, and by letter dated September 21, 2005, advised plaintiff that his adjournment was granted, but no specific date was set. The letter indicated plaintiff should notify the Secretary to the ZBA to when he wished to appear so that the matter could be included on the agenda. By letter dated December 22, 2005, plaintiff was notified that at a duly held meeting on December 20, 2005 of the ZBA, his application was dismissed without prejudice to renew. Thus, plaintiff recognizes that the matter is not ripe for Article 78 review. However, plaintiff maintains that the ZBA's dismissal of his application is part of the defendants' course of discriminating conduct and disinterested malevolence. Plaintiff contends that past applications have been adjourned and retained on the ZBA's calendar for longer periods of time without being dismissed. Moreover, plaintiff argues, failing to rule on his application without any explanation results in costing him additional time and money.

Plaintiff has submitted competent evidence in the form of an affidavit from a former Mayor of the Village to suggest that the owners of each of the other exercise studios in the Village, were not required to obtain a new certificate of occupancy, file a site review plan or apply for a variance with regard to off-street parking. The evidence also raises questions as to whether, upon purchasing property in the Village, Code § 55-18.3(A) was enforced against similarly situated new property owners.

Accordingly, the court finds that plaintiff's first cause of action for damages pursuant to 42 USC § 1983 is sufficient to withstand summary dismissal with respect to violation of his property rights under the

equal protection laws. However, plaintiff has not made a prima facie case entitling him to summary judgment on his equal protection claim. Therefore, that branch of plaintiff's cross motion must be denied.

Plaintiff's remaining claims for damages pertaining to threats of being removed and being asked to resign from the Board have been reviewed and are patently without merit. It is undisputed that at the time the action was commenced, plaintiff was still a member of the Board. Moreover, plaintiff has submitted no authority to support a contention that he has a constitutional or civil right to remain a member of the Board.

Finally, although plaintiff's notice of cross motion seeks to strike and dismiss certain affirmative defenses interposed in defendants' answer, the papers submitted do not address or contain any arguments in support thereof. Thus, plaintiff has failed to establish that dismissal of the affirmative defenses is warranted (*see, generally*, ***Winegrad v New York Univ. Med Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Consequently, that branch of plaintiff's cross motion is also denied.

The first cause of action continues as to the Village of Sag Harbor. The remainder of plaintiff's complaint, including plaintiff's claim for punitive damages is dismissed.

Dated: June 18, 2007

HON. WILLIAM B. REBOLINI, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION