

Hauser v Town of Orangetown
2020 NY Slip Op 34472(U)
May 13, 2020
Supreme Court, Rockland County
Docket Number: 35424/2015
Judge: Robert M. Berliner
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT : STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. ROBERT M. BERLINER, J.S.C.

-----X

JOSEPH HAUSER, JR.,

Plaintiff,

DECISION AND ORDER

-against-

Index No.: 35424/2015

TOWN OF ORANGETOWN, ROBERT P.
ZIMMERMAN, COUNTY OF ROCKLAND,
VINCENT ALTIERI, COUNTY OF
ROCKLAND DRAINAGE AGENCY,

Motion Sequence #1

Defendants.

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The following papers, numbered 1 to 6, were read on this motion by the defendant Town of Orangetown (hereinafter "Town") for an order dismissing in their entirety the plaintiff's complaint and all cross-claims which have been asserted against the Town on the grounds that the complaint and cross-claims fail to state causes of action against it, as follows:

Notice of Motion/Affirmation in Support/Exhibits.....	1-2
Affidavit in Support/Exhibit A.....	3
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Upon the foregoing papers, it is ORDERED that this motion is disposed of as follows:

Background/Facts

In this action, plaintiff seeks both injunctive and monetary relief from the Town and the other named defendants. Plaintiff's causes of action allegedly arise from actions which the defendant Robert P. Zimmerman (hereinafter "Zimmerman") has taken with respect to his property which have adversely affected the plaintiff's property. Both properties are in a subdivision for which the plaintiff had obtained the approval of the Town Planning Board's permission to develop. Plaintiff alleges that Zimmerman's use of his property and a right of way in the development have violated conditions which the Planning Board made part of its subdivision approval and are conditions stated on the filed final subdivision plat. Regarding Zimmerman, plaintiff seeks a judgment enjoining him from continuing the activities which he claims violated the Planning Board's approval conditions, as well

as approvals which the co-defendants County of Rockland (hereinafter “Rockland”) and the County of Rockland Drainage Agency (hereinafter “Drainage Agency”) had issued in connection with the development of the subdivision. Plaintiff seeks monetary damages from Zimmerman for his alleged land trespass and creation of a private nuisance on his land.

With respect to the Town, plaintiff alleges that it had been made aware of Zimmerman’s violations but had neglected and refused to enforce the conditions of the Planning Board approval and the filed plat. Accordingly, plaintiff seeks a judgment against the Town declaring that it is legally obligated to enforce these conditions and to require Zimmerman to comply with them. Plaintiff alleges that the Town has a duty to remediate Zimmerman’s alleged illegal activities which have adversely affected his property. He has demanded a money judgment against the Town for its alleged gross negligence in not enforcing the conditions, and alleges that he has sustained a deprivation of property rights which are guaranteed him under the 5th and 14th amendments of the United States Constitution. Specifically, plaintiff alleges the Town has violated his procedural due process rights under the 14th Amendment and that he is entitled to money damages under 42 USC 1983, as well as attorney’s fees under 42 USC 1988.

Plaintiff commenced this action with the filing of a summons with notice on December 29, 2015. A complaint was filed on February 4, 2016. The Town served its answer on February 17, 2016 and an amended answer and a second amended answer on February 18, 2016 and March 1, 2016 respectively. In its answers, the Town denied all of the allegations of the causes of action which the plaintiff has asserted against it. The answers contain cross-claims against the co-defendants and raised several affirmative defenses which included CPLR Rule 3211(a)(2),(3),(7) and (10). Zimmerman filed his answer with cross-claims on March 29, 2016. Rockland served its answer with cross-claim on February 26, 2016.

The Second, Third, Sixth and Seventh Causes of Action of the complaint are asserted against the Town. Two of the causes of action inadvertently are numbered “Seventh.” The first is denominated as a claim for gross negligence against the Town, Rockland, and Drainage Agency. Plaintiff alleges that defendants’ failure to respond to the plaintiff’s requests that they enforce approved drainage rules and remediate Zimmerman’s alleged illegal construction on his property which produced flooding on his adjacent property constituted gross negligence on their parts. Plaintiff seeks \$250,000 in damages pursuant to 42 USC 1983 to compensate him for his alleged

deprivations of constitutionally protected property rights which he describes as being “substantial enough.”

The second claim denominated as “Seventh” is asserted under 42 USC 1983, in which the plaintiff alleges that the actions of the three municipal defendants resulted in the deprivation of the plaintiff’s property rights under the Fifth and Fourteenth Amendments to the Constitution. Again, plaintiff seeks \$250,000 in damages pursuant to 42 USC 1983 to compensate him for his alleged deprivation of property rights.

Plaintiff’s Second Cause of Action is for a “declaratory judgment” against all defendants. The declaratory judgment sought refers to Zimmerman’s alleged illegal construction requiring remediation. The Third Cause of Action seeks a judgment declaring that the town had a legal obligation to remediate Zimmerman’s alleged illegal activity - actions which are in violation of the Planning Board’s subdivision approval and the filed plat, as well as Rockland’s topographical, grading and soil plans and approvals. Plaintiff’s Sixth Cause of Action is denominated as one for mandamus. He seeks a court order directing the Town to enforce parking restrictions, access restrictions, drainage rules and regulations and subdivision approval conditions and require the removal of a berm constructed by Zimmerman on his property line which resulted in the diversion of surface water onto his property.

The Town’s answers deny the plaintiff’s allegations of wrong doing as stated in the complaint and raise affirmative defenses which specifically question the legal sufficiency of the causes of action. Additionally the Town’s answers assert the affirmative defense that the action does not name Laura Hauser, plaintiff’s wife. The Town alleges she is a co-owner of the plaintiff’s property and a necessary party to the action.

The Parties’ Contentions

In support of the motion, the Town asserts that it did not owe the plaintiff a legal duty to enforce the conditions of the Planning Board and plat which plaintiff claims were violated by Zimmerman. A special relationship did not exist between the plaintiff and the Town which gave rise to any legal duty on its part to enforce these conditions. Consequently, the Town argues that all of the plaintiff’s causes of action which (1) seek declarations that the Town was legally obligated to enforce these conditions, (2) seek a mandamus directing the Town to enforce these conditions and

(3) seek damages for not acting on the plaintiff's complaints, are not recognizable under New York and Federal law and are subject to dismissal pursuant to CPLR Rule 3211(a)(7).

Additionally, the Town argues that the Sixth Cause of Action which sounds in negligence, is subject to dismissal on the grounds (1) that the Town did not owe plaintiff a legal duty, and (2) that the cause of action is subject to dismissal based upon the plaintiff's failure to serve a Notice of Claim upon the Town as required by Sections 50-e and i of the General Municipal Law and Section 67 of the Town Law.

The Town refers to the attached Affidavit of John Giardello (hereinafter "Giardello"), Director of the Town of Orangetown Office of Building, Zoning, Planning Administration and Enforcement. In his Affidavit, Giardello discusses the responsibilities of his office and the discretionary nature of the decisions he makes as director. Giardello confirms that he made the determination as Director that his office would not issue a violation in response to the complaints regarding Zimmerman's alleged failure to comply with the conditions of the plaintiff's subdivision approval. It is argued that the decision was made within the scope of Giardello's discretion as Director and was the product of his judgment. Giardello submits his decision is entitled to absolute governmental immunity.

The Town argues that plaintiff's 42 USC 1983 cause of action fails to assert facts sufficient to support his claims of Fifth and Fourteenth Amendment constitutional deprivations. It is argued that plaintiff did not possess a constitutionally protected property right to the Town's enforcement of the subdivision use restrictions.

Finally, the Town submits the complaint must be dismissed because Laura Hauser, a co-owner of plaintiff's property, is not a named plaintiff and is indispensable to the action.

Plaintiff opposes the motion. Plaintiff argues, *inter alia*, that the motion is premature as there has been no discovery which will develop the allegations and merit of the complaint. Second, plaintiff alleges that the only affidavit based upon personal knowledge in support of the Town's motion is pure hearsay and not based upon any knowledge, personal or otherwise. Third, plaintiff argues that the building department's director, John Giardello, assumed dictatorial authority which has no basis in law and states that even after final approval is given by the Board, he alone will

decide whether or not it will be ignored or enforced. Importantly, plaintiff argues that governmental immunity does not lie in this case since the government affirmatively represented that the lots at issue would be provided with certain protections. These protections, argues plaintiff, create a “special relationship” between plaintiff and the Town which overrides the Town’s governmental immunity claim.

Legal Analysis/Discussion

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see*, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Morone v Morone*, 50 NY2d 481, 484 [1980]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]). In assessing a motion under CPLR 3211 (a) (7), a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*Rovello v Orofino Realty Co.*, *supra*, 40 NY2d at 635) and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268 , 275 [1977]; *Rovello v Orofino Realty Co.*, *supra*, 40 NY2d at 636).

Here, upon a review of the submissions, it is clear that plaintiff does not possess a constitutionally protected property right to the Town’s enforcement of the subdivision use restrictions established by the Planning Board.

In addition, the Town did not owe a duty to plaintiff to enforce land use rules and regulations in the absence of a special relationship with the plaintiff. It is well established that a municipality does not owe a legal duty to an individual to enforce a statute or regulation in the absence of a special relationship between it and the party claiming to have been aggrieved by reason of its failure to enforce (*Sanchez v Liberty*, 42 NY2d 876, 877-878 [1977]; *O’Connor v New York*, 58 NY2d 184, 189 [1983]). A special relationship may be formed in one of three ways: (1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; (3) when the municipality assumes positive directions and control in the face of a known,

blatant and dangerous safety violation (*citing Garrett v Holiday Inns, Inc.*, 58 NY2d 253, 261, 262 [1983]). It is the plaintiff's burden to establish the existence of a special relationship between him or herself and the defendant municipality (*Palaez v Seide*, 3 NY3d 186, 200 [2004]).

Here, plaintiff's complaint fails to allege any facts which show or tend to show that a special relationship exists or existed between the plaintiff and the Town. As a result of the plaintiff's failure to establish the existence of a special relationship, plaintiff's Second, Third and Sixth Causes of Action are dismissed.

The Second Cause of Action alleges that Zimmerman installed a berm in violation of the Planning Board's conditions and the filed subdivision plot, as well as non-specified subdivision regulations, zoning rules, regulations, ordinances, laws and/or environmental regulations of the Town, County or Federal Government.

The Third Cause of Action refers to the plaintiff's allegations that the co-defendant illegally parked vehicles in a roadway within the subdivision which had been restricted for ingress and egress purposes and failed to maintain a cul de sac planter island.

Since the Town did not owe the plaintiff a duty to enforce the statutes, law, rules and regulations which plaintiff alleged it should have enforced, plaintiff's causes of action which seek declarations from the court that the Town was obligated to remediate Zimmerman's alleged illegal land uses must be dismissed.

Likewise the plaintiff's Sixth Cause of Action sounding in mandamus must be dismissed because the town may not be ordered to cause removal of the berm, or to enforce parking restrictions, access restrictions, drainage rules, regulations and subdivision approvals. In addition, the Sixth Cause of Action must be dismissed because a viable mandamus cause of action does not exist to compel a Town to enforce land restrictions (*see, Saks v Petosa*, 184 AD2d 512, 513 [2d Dept 1992]). It is well settled that when decisions whether or not to enforce a land use regulation is to be enforced rest in the proper discretion of public officials charged with enforcement, such decisions are not subject to judicial review (*Id.*).

While plaintiff has a private right to seek an injunction against Zimmerman from violating the statutes, laws, rules, regulations and approvals which the plaintiff alleges he has violated, the limited allegations in the complaint are likely insufficient. The pleadings and proof in an equity action must be specific, detailed and demonstrate that the plaintiff has suffered a diminution of the value of his or her home and property and that he or she has suffered a depreciation in its value as

the direct result of the defendant's activities (*Santulli v Drybka*, 196 AD2d 862, 863 [2d Dept 1993], citing *Cord Meyer Development Co. v Bell Bay Drugs*, 20 NY2d 211, 218 [1967]; see *Little Joseph Realty v Town of Babylon*, 41 NY2d 738 [1977]). Here, the allegations of the complaint do not state allegations which claim such property damages. Plaintiff's claim that he sustained "sufficient" damage is legally insufficient.

The plaintiff's Seventh Cause(s) of Action against the Town sound in gross negligence. It is alleged that the Town "neglected and refused to respond to plaintiff's demands to enforce parking regulations of the subdivision it approved." It further alleges that the Town "neglected and refused" to respond to plaintiff's demand that the Town remediate Zimmerman's illegal construction and the subsequent flooding of his property. Plaintiff claims that as a result of the foregoing, he has sustained property damages and that the value of his home has been diminished.

Plaintiff's negligence claims must be dismissed, however, because he fails to allege that he served a Notice of Claim upon the Town. The service of a Notice of Claim upon a Town is required by New York Town Law §67-1 and New York General Municipal Law §50-e. The timely and proper service of a notice of claim is a condition precedent to the commencement of a common law tort action against a municipality (*Brown v City of New York*, 95 NY2d 389, 392, 393 [2000]; *Santoro v Town of Smithtown*, 40 AD2d 736, 737 [2d Dept 2007]). A complaint served upon a municipal defendant is legally insufficient if it does not allege compliance with the General Municipal Law Section 50-e, and must be dismissed (*Davidson v Bronx Municipal Hosp.*, 64 NY2d 59, 62 [1984]).

In light of the above, plaintiff's failure to allege his compliance with the Town Law and General Municipal Law Notice of Claim is fatal to plaintiff's negligence causes of action.

In addition to the foregoing, plaintiff's claims pursuant to 42 USC 1983 and 1988 must be dismissed. In order to establish a 42 USC 1983 cause of action against a municipal defendant, a plaintiff must both plead and establish that an act or omission which advances an official policy or custom had caused him or her to sustain the deprivation of a recognizable constitutional right (*Bassett v City of Rye*, 104 AD3d 889, 890 [2d Dept 2013]; *Nasca v Sgro*, 101 AD3d 963 [2d Dept 2012], citing *Jackson v Police Dept of the City of New York*, 192 AD2d 641, 642 [2d Dept 1993]). The failure to adequately plead these elements renders a complaint seeking 42 USC 1983 damages fatally defective (*Willinger v Greenburgh*, 169 AD2d 715, 716 [2d Dept 1990]).

As stated in *Monell v Dept of Social Serv. of City of New York*, 436 US , 658 [1977], a

municipality will be liable for damages in a 1983 action only when the actions of its officials or employees which a plaintiff is alleging to be unconstitutional implement or execute a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers (*Id.*, at 690). A municipal corporation will be found liable under 42 USC 1983 only where its policies or customs actually cause the constitutional deprivation which the plaintiff claims. A municipality is not subject to liability under 42 USC 1983 by the common law principle of respondeat superior (*Id.*, at 691).

For pleading purposes, it is not sufficient for a 42 USC 1983 cause of action to present legal and factual conclusions that a municipal official or employee performed acts which deprived a plaintiff of a constitutional right, in the absence of facts which identify the nature of the conduct or the policy or custom which the conduct allegedly advocated (*Cozzani v County of Suffolk*, 84 AD3d 1147, citing *Ashcroft v IQBAL*, 556 U.S. 62). The complaint must contain factual allegations which demonstrate a causal link between a municipal policy or custom and the alleged constitutional deprivation (*City of Canton v Harris*, 489 U.S. 378 [1988]). A cause of action which is supported with only broad and conclusory statements without specific factual allegations fails to state a recognizable cause of action and is subject to dismissal (*Leung v City of New York*, 216 AD2d 10 [1st Dept 1995]; *R.A.C. Group, Inc. v Board of Ed. Of City of New York*, 295 AD2d 489, 490 [2d Dept 2002]).

Here, the allegations in plaintiff's 42 USC 1983 cause of action simply allege that the Town's officials did not enforce Zimmerman's compliance with subdivision restrictions and the conditions of the Planning Board's subdivision approval. Plaintiff alleged no facts which causally connect the Town official's discretionary decision not to enforce the conditions of the Planning Board subdivision approval with the plaintiff's claimed deprivation of property or due process rights. As such, the claim is fatally defective.

Plaintiff alleges that the Town's refusal to enforce the subdivision's use restrictions has resulted in his property having been "lawfully taken by the Town without payment of compensation in violation of the Fifth Amendment and Fourteenth Amendment of the Constitution". He further alleges that he has a "substantial enough" property interest.

However, the complaint does not allege that the Town has taken possession or control of any portion of plaintiff's property for a public good which would have triggered its obligation to compensate plaintiff for the taken property in the absence of its exercise of its eminent domain

power. The complaint therefore does not state a cause of action sounding in “inverse condemnation” under the Fifth Amendment and also fails to state a Fifth Amendment “taking” cause of action.

Similarly, plaintiff’s complaint fails to state a substantial due process cause of action. Plaintiff’s complaint does not state facts sufficient to demonstrate how the Town’s decision not to enforce the subdivision conditions rises to the level of egregious, arbitrary and capricious conduct which has deprived the plaintiff of a protected property right (*see, County of Sacramento v Lewis*, 523 US 833, 847 [1997]). It is settled law that a pleading which consists of nothing other than “labels, conclusions and a formulistic recitation of the elements of a cause of action,” does not state a cause of action (*Bell Atlantic Corp. v Twombly*, 550 US 544 [2007]).

Finally, the Town alleges the complaint must be dismissed because all proper parties are not named in the lawsuit. Specifically, it is alleged that Laura Hauser, along with plaintiff Joseph Hauser, is an owner of the property which adjoins Zimmerman’s property, and is, therefore, an indispensable party. A final determination of the action will not be binding on Laura Hauser and, as such, aspects of this litigation will remain unresolved.

The court has considered all arguments and submissions of the parties, notwithstanding the court’s failure specifically to refer to such arguments or submissions herein.

Accordingly, it is

ORDERED that defendant, Town of Orangetown’s motion to dismiss the plaintiff’s complaint against it, as well as the cross-claims which the co-defendants have asserted against the Town of Orangetown is granted, and the complaint and cross-claims against the Town of Orangetown are dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York
May 13, 2020

ENTER


HON. ROBERT M. BERLINER, J.S.C.

To:
Counsel of record via NYSCEF