

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE ESTATE OF GERTRUDE VAN :
DER LEER : CIVIL ACTION
Plaintiff :
v. :
THE CITY OF PHILADELPHIA, :
et al. :
Defendants : NO. 03-4324

MEMORANDUM AND ORDER

McLaughlin, J.

June 15, 2004

This case arises out of the demolition of a property located at 207 Belgrade Street ("the property") in Philadelphia. The property came under the control of the plaintiff Linda Snyder upon Gertrude Van Der Leer's death in 1999. On May 7, 2001, the City of Philadelphia's Department of Licenses and Inspections declared the property "imminently dangerous." The City subsequently demolished the building. The plaintiff alleges that the defendants, the City of Philadelphia and Scott Mulderig, an inspector for the Philadelphia Department of Licenses and Inspections, violated her procedural due process rights and were negligent.

The defendants filed a motion for summary judgment on the plaintiff's claims and on their counterclaim for recovery based on contractual and quasi-contractual theories. The Court

held a hearing on May 20, 2004 and will grant the motion in part and deny it in part without prejudice. The defendants may take the depositions of Linda and Bruce Snyder and may renew their motion for summary judgment based on those depositions.

I. Facts

The facts stated in a light most favorable to the plaintiff are as follows. Upon Gertrude Van Der Leer's death in 1999, the property came under the control of Plaintiff Linda Snyder, her Executrix and sole heir. The plaintiff spent \$3500 repairing the building between 1999 and 2001. Compl. ¶ 9.

Scott Mulderig inspected the property on April 22, 2001. His report noted that the "front wall bulged" and that the "rear wall has loose and missing brick work." Def.'s Mot. for Summ. J., Ex. B.

On May 7, 2001, the City of Philadelphia's Department of Licenses and Inspections ("L&I") declared the property "imminently dangerous" in a Notice of Violation ("notice") which was mailed to the plaintiff. The notice also states:

You are hereby ordered to demolish or repair the said premises IMMEDIATELY. If you fail to adhere to this notice the city will demolish the premises . . . and bill the owner for the costs incurred.

If you wish to appeal this violation, apply to the Board of Building Standards, Municipal Services Building - Concourse Level, 1401 J.F.K. Blvd., Philadelphia, Pa. 19102-

1686, within 10 days of this notice. Telephone inquiries concerning appeal process can be directed to 686-2419. It is required to submit a copy of this notice with the appeal.

Def.'s Mot. for Summ. J., Ex. B. The plaintiff received the letter.¹

Bruce Snyder, Linda Snyder's husband, submitted an affidavit dated May 14, 2004 stating the following facts. After receiving the notice determining the property to be imminently dangerous, Bruce Snyder called the L&I's number on the notice. He spoke to Scott Mulderig. Mr. Mulderig told him that in order to prevent the demolition of the building, he would need to have a structural engineer or architect inspect the building and declare it sound, and that the sealed report would have to be supplied to L&I. Mr. Snyder and his wife retained Joseph Hoffman, a structural engineer, to inspect the building. On June 4, 2001, Mr. Hoffman conducted the inspection. He provided an

¹ In an undated answer to the defendants' requests for admission filed on May 28, 2004, the plaintiff for the first time denies receiving this notice. The Court does not accept this or any other statement in this document, including the fact that the plaintiff's husband had made some repairs to the building after receiving the notice. The answer to the defendants' requests for admission was filed after the summary judgment motion was fully briefed and argued, despite the fact that the defendants raised the lack of a response to their requests for admission in their motion for summary judgment. Furthermore, the Court ordered the plaintiff to submit evidence in support of its motion by May 14, 2004. The Court will not accept the excuse that the plaintiff forgot to submit this answer earlier. Furthermore, the statement that the plaintiff did not receive the notice directly contradicts Bruce Snyder's affidavit.

engineer's report to Mr. Mulderig, and Mr. Mulderig stated that he was satisfied with the report, and that the demolition notice was rescinded. Aff. of Bruce Snyder ("Snyder Aff.").

Mr. Hoffman's report states that he performed a visual inspection only. It states that there are no apparent bulges in the wall, that steel plates and bolts in the building are rusted but not severely deteriorated, that the lintels over the windows are deteriorating, and that the bricks above the window are loose and that one had fallen to the sidewalk. It also states that a temporary lintel is necessary to prevent more brickwork from falling. It does not address any other structural condition that may or may not exist in the rest of the building. Def.'s Mem. of Law in Further Support of Mot. for Summ. J., Ex. A.

On June 24, 2001, the Philadelphia Fire Department responded to the property in response to complaints of falling bricks. On August 21, 2001, the police radio received a report of falling bricks, and Scott Mulderig went to the scene. Def.'s Mot. for Summ. J., Ex. F.

The City demolished the building. The plaintiff and her husband were not told of the two emergency responses in the summer of 2001 about reports of falling bricks. On September 11, 2001, Bruce Snyder was notified by a neighbor that the property was being demolished. Snyder Aff. at ¶¶ 11, 12.

II. Analysis

The defendants make three arguments in their motion for summary judgment on the procedural due process count (Count I) of the complaint. They argue that: 1) the plaintiff's procedural due process rights have not been violated; 2) there is no claim against the City of Philadelphia; and 3) Scott Mulderig is entitled to qualified immunity. The defendants argue that the negligence count (Count II) is barred by the Political Subdivision Tort Claims Act, 42 Pa. Cons. Stat. § 8541, et seq. Finally, the defendants seek summary judgment on their counterclaim for recovery based on both contractual and quasi-contractual theories.²

A. Procedural Due Process

In order to establish a cause of action for a procedural due process violation, the plaintiff must prove that a

² In deciding a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party. Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 637 (3d Cir. 1993). A motion for summary judgment shall be granted where all of the evidence demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Pro. 56(c). The moving party has the initial burden of demonstrating that no genuine issue of material fact exists. Once the moving party has satisfied this requirement, the non-moving must present evidence that there is a genuine issue of material fact. The non-moving party may not simply rest on the pleadings, but must go beyond the pleadings in presenting evidence of a dispute of fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986).

person acting under the color of state law deprived the plaintiff of a protected property interest. The plaintiff must also establish that the state procedure for challenging the deprivation does not satisfy the requirements of procedural due process. Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 680 (3d Cir. 1991).

Due process requires that a deprivation of property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." "The opportunity to be heard must be at a meaningful time and in a meaningful manner." Id. (citations omitted). When a state provides a full judicial mechanism with which to challenge the administrative decision to deny an application for a building permit, the state provides adequate due process. Bello v. Walker, 840 F.2d 1123, 1128 (3d Cir. 1988).

Here, the Board of License and Inspection Review is required to provide an appeal procedure and a hearing upon request. Philadelphia Home Rule Charter § 5-1005 (Adopted Apr. 17, 1951), available at <http://www.phila.gov/personnel/homerule>. The notice itself stated that an appeal could be made within ten days. The plaintiff, however, argues that Mr. Snyder attempted to follow the procedure described in the notice by calling the number listed in the notice and by following the instruction of Scott Mulderig.

The mere existence of an ordinance providing an appeal and a hearing does not automatically compel the conclusion that a city conforms with procedural due process requirements when it takes an action against a property. The Court must examine the actions taken against the specific property to see if the city provided notice and an opportunity to be heard with respect to that property. See, e.g., O'Hanlon v. City of Chester, No. 00-0664, 2002 U.S. Dist. LEXIS 5766 at *15 (E.D. Pa. Mar. 27, 2002), aff'd, 79 Fed. Appx. 531, 2003 U.S. App. LEXIS 22422 (3d Cir. Pa., Oct. 30, 2003).

For the purposes of this motion, the Court must accept the facts alleged in Mr. Snyder's affidavit. Mr. Snyder stated that he complied with Mr. Mulderig's instructions by supplying an engineer's report. He was told that the "imminently dangerous" characterization was rescinded. Assuming that the notice was rescinded, the City never reissued a new notice and opportunity for a hearing before demolishing the building. These disputed facts raise a question as to whether the plaintiff's procedural due process rights were violated.³

When determining whether Mr. Mulderig is entitled to

³ Mr. Snyder also averred that when he first called Mr. Mulderig, Mr. Mulderig informed him that he would have to provide an engineer's report to prevent the demolition of the building. However, there is no allegation that Mr. Mulderig stated that providing this report would serve as an appeal, as opposed to evidence that the plaintiff would submit during the appeal process.

qualified immunity, the Court must undertake a two-step inquiry. First, the Court must consider whether the facts show that Mr. Mulderig's conduct violated a constitutional right. As discussed above, Mr. Snyder's affidavit, if true, would show a violation. The next inquiry is whether it would be clear to a reasonable official that the conduct was unlawful in the situation he confronted. Saucier v. Katz, 533 U.S. 194, 201-02 (2001). Because Mr. Snyder's affidavit indicates that Mr. Mulderig either lied to or misinformed the plaintiff about the rescission of the notice, the Court will not grant summary judgment on the basis of qualified immunity.

The Court, however, is extremely troubled by the plaintiff's conduct in the course of this litigation. The plaintiff submitted no evidence with its opposition to the defendants' motion for summary judgment. Plaintiff's counsel did not take the affidavit of Bruce Snyder until six days before the hearing. Eight days after the hearing, the plaintiff, for the first time, submitted answers to the defendants' request for admissions and Bruce Snyder's supplemental affidavit, which was executed that day.

The Court is particularly concerned with Mr. Snyder's assertion in his affidavit that Mr. Mulderig stated that he was satisfied with the engineer's report and that the demolition notice was rescinded. These facts were not alleged in the

complaint. These statements seem inconsistent with the engineer's report, which did not state that the building was structurally sound and noted that repairs were necessary to prevent more brickwork from falling. It is doubtful that this report would correct the "imminently dangerous" classification. The defendants, therefore, shall be allowed to take the depositions of the plaintiff and her husband to resolve the inconsistencies in the factual record.

Finally, as for the plaintiff's claims against the City of Philadelphia, the plaintiff must prove that her constitutionally-protected rights were violated, and that the alleged violation resulted from a municipal custom or policy. Monell v. Dept. of Soc. Servs., 436 U.S. 658, 694-95 (1978). There is no evidence that the City of Philadelphia has a policy or custom of encouraging or training its employees to ignore the process that is outlined in the violation notice.⁴ Proof of a single incident by a municipal employee is insufficient to establish that an official custom or practice caused the alleged constitutional violation. City of Oklahoma City v. Tuttle, 471 U.S. 808, 822 (1985). The plaintiff has offered no evidence of

⁴ The City of Philadelphia's use of the Notice of Violation is not an unconstitutional policy, as it clearly states that the city will demolish the property, unless it is demolished or repaired. It further states that an appeal may be made within ten days to the Board of Building Standards. See Midnight Sessions, 945 F.2d at 680.

situations similar to the present case. The plaintiff's claim against the City of Philadelphia cannot survive summary judgment.

B. Negligence

The defendants argue that the plaintiff's state law negligence claim is barred by the Political Subdivision Tort Claims Act ("the Act"), 42 Pa. Cons. Stat. § 8541, et seq. The Act immunizes the City of Philadelphia and its employees from most state law claims. The plaintiff may proceed with a state law claim if it fits into one of the eight exceptions enumerated in § 8542(b).

The plaintiff argues that the City's destruction of the property falls under two exceptions to the Act. The first is the "care, custody and control of real property" exception. For this exception to apply, the City must possess or control the real property in question. 42 Pa. Cons. Stat. § 8542(b)(3).

Exceptions to the Act are to be strictly construed. The City's duty to inspect private property does not rise to the level of control or possession required to fall within the real property exception to the Act. "Possession" under this exception requires total control over the premises. Limited control or mere occupation of the premises for a limited period is not sufficient to impose liability. City of Pittsburgh v. Estate of Stahlman, 677 A.2d 384, 386-87 (Pa. Cmwlth. 1996). See also York

Redev. Auth. v. Keener, 516 A.2d 832, 833-34 (1986).

The real property section applies "only to those cases where acts of the local agency or its employees make the property unsafe for the activities for which it is regularly used, for which it is intended to be used or for which it may reasonably be foreseen to be used." Mascaro v. Youth Study Ctr., 514 Pa. 351, 361-62 (1987). Furthermore, it only applies to those cases where it is alleged that the artificial condition or defect of the land itself causes the injury, not merely when it facilitates the injury by acts of others. Id. at 362.

In the present case, the City ordered the demolition of a building. A property defect did not cause an injury. See Id.; Kiley v. City of Philadelphia, 537 Pa. 502, 506-07 (1994). The Court finds that this exception does not apply to the present case.

The plaintiff also argues that Mr. Mulderig could be found liable for his "willful misconduct." The Act provides that an individual employee may be held liable where his conduct constitutes a "crime, actual fraud, actual malice or willful misconduct." 42 Pa. Cons. Stat. Ann. § 8550. The plaintiff has presented no evidence of actual malice or willful misconduct. The Court will grant summary judgment on this theory.

C. Counterclaim

The defendants' counterclaim against the plaintiff seeks to recover the costs expended to demolish the property. The counterclaim is based on the theory of implied contract and quasi-contract.

Implied contracts are subdivided into contracts implied-in-fact and contracts implied-in-law. An implied-in-fact contract arises when parties agree upon the obligation to be incurred, but their intention is not expressed in words and is inferred from their actions in light of the surrounding circumstances. An implied-in-law contract is a quasi-contract, which imposes a duty, absent any sort of agreement, when one party receives an unjust enrichment at the expense of another party. Dep't of Env'tl. Res. v. Winn, 597 A.2d 281, 284 n.3 (Pa. Cmwlth. 1991) (citations omitted).

The plaintiff's evidence regarding Mr. Snyder's attempt to comply with Mr. Mulderig's instructions and Mr. Mulderig's assurance that the notice was rescinded creates a material issue as to whether the plaintiff's intention to contract may be inferred from her and Mr. Snyder's actions. This evidence also raises a question as to whether the plaintiff's retaining the benefit of the demolition without payment would be inequitable and unjust. For these reasons, summary judgment is inappropriate on the defendants' counterclaim.

An appropriate order follows.

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ORDER

AND NOW, this 15th day of June, 2004, upon consideration of the defendants' Motion for Summary Judgment (Docket No. 8), the responses and replies thereto, and following oral argument on May 20, 2004, IT IS HEREBY ORDERED that the motion is DENIED in part without prejudice and GRANTED in part for the reasons stated in a memorandum of today's date as follows:

1. The motion is GRANTED as to the claims against the City

of Philadelphia under § 1983.

2. The motion is GRANTED as to the negligence claim against all defendants.

3. The motion is DENIED with respect to the § 1983 claim against Mr. Mulderig and the defendants' counterclaim.

IT IS FURTHER ORDERED that the defendants shall be allowed to take the depositions of the plaintiff and her husband. This is the only further discovery the Court will allow.

BY THE COURT:

MARY A. McLAUGHLIN, J.