

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

LUIS E. MUNOZ, et al. : CIVIL ACTION
 :
 v. :
 :
 CITY OF PHILADELPHIA, et al. : NO. 05-5318

MEMORANDUM

Bartle, C.J.

February 10, 2006

Plaintiffs Luis and Deborah Munoz (the "Munozes"), who are husband and wife, and General Farmers Market, Inc., allege that defendants the City of Philadelphia (the "City"), Philadelphia Redevelopment Authority ("RDA"), and Frankford Community Development Corporation ("FCDC"), have taken their property without just compensation in violation of federal and state law. Before the court are the motions of the defendants to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. Because the defendants contest the ripeness of certain claims, they are challenging the court's subject-matter jurisdiction, and we will consider those arguments pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Armstrong World Indus., Inc. by Wolfson v. Adams, 961 F.2d 405, 410 (3d Cir. 1992).

In considering a motion to dismiss pursuant to Rule 12(b)(6), we must accept all well-pleaded facts in the complaint as true and may consider matters of public record. Spruill v.

Gillis, 372 F.3d 218, 223 (3d Cir. 2004); Pension Benefit Guaranty Corp. v. White Consul. Indus. Inc., 998 F.2d 1192, 1196 (3d Cir. 1993). When considering a motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1), the court may inquire into facts that are outside of those on the face of the pleadings. Armstrong, 961 F.2d at 410 n.10.

In August 2001, the Munozes purchased Nino's Farmer's Market ("Nino's") located in the Juniata section of Philadelphia. They formed plaintiff General Farmers Market, Inc. to operate Nino's. Within a few months thereafter, the Munozes were notified by customers of a possible redevelopment of the area. In November 2002, the Philadelphia Planning Commission certified the neighborhood within which Nino's was located as blighted and adopted a redevelopment plan proposed by FCDC to build a new housing development. Throughout 2002 and 2003, FCDC worked with the City to refine and promote the redevelopment plan. During this time, the plaintiffs' business declined, and they were unable to repay their business loans. They attributed the decline in business to their customers' belief that Nino's would eventually close due to the redevelopment project.

On November 28, 2003, Sovereign Bank initiated foreclosure proceedings on the Munozes' personal and business property. Thereafter, in April 2004, the Munozes closed Nino's. On May 28, 2004, the Munozes filed for bankruptcy protection. That same day, the RDA notified them that a hearing was scheduled to take place concerning an ordinance that would authorize the

RDA to acquire their property. On July 8, 2004, one day before the scheduled hearing, the RDA sent a Notice of Interest to the Munozes. This notice stated that it was considering the purchase of their property as part of the redevelopment project. At present, however, the RDA has not issued a Declaration of Taking and has not made an offer of compensation.

Sovereign Bank was granted relief from the automatic stay in the Munozes' bankruptcy proceedings and on September 12, 2005, the property was sold at a sheriff's sale. The plaintiffs filed this action on October 11, 2005.

Plaintiffs bring all their claims pursuant to 42 U.S.C. § 1983. They allege violations of: (1) the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. §§ 4625(a), 4651, and 4655 ("URA"); (2) Pennsylvania's Eminent Domain Code, 26 PA. STAT. ANN. § 1-101 et seq.; (3) Pennsylvania's Urban Redevelopment Law, 35 PA. STAT. ANN. § 1701 et seq.; (4) their right to just compensation for their property under the Fifth Amendment; and (5) their right to substantive and procedural due process under the Fourteenth Amendment.

I.

In Count I of the complaint, plaintiffs allege that defendants violated §§ 4625(a), 4651, and 4655 of the URA by failing to plan the redevelopment in a manner that recognized and addressed their displacement. Section 4625(a) provides:

Programs or projects undertaken by a Federal agency or with Federal financial assistance shall be planned in a manner that (1)

recognizes, at an early stage in the planning of such programs or projects and before the commencement of any actions which will cause displacements, the problems associated with the displacement of individuals, families, businesses, and farm operations, and (2) provides for the resolution of such problems in order to minimize adverse impacts on displaced persons and to expedite program or project advancement and completion.

42 U.S.C. § 4625 (a).

Section 4651 reads, in part:

In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many Federal programs, and to promote public confidence in Federal land acquisition practices, heads of Federal agencies shall, to the greatest extent practicable, be guided by the following policies ...

42 U.S.C. § 4651. It proceeds to list ten policies, including, "(1) The head of a Federal agency shall make every reasonable effort to acquire expeditiously real property by negotiation."

Id. § 4651(1). Plaintiffs argue that § 4651 is made applicable to the defendants by § 4655, which requires that a State agency

under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the acquisition of real property be guided, to the greatest extent practicable under State law, by the land acquisition policies in section 4651

Id. § 4655(a).

"Section 1983 is not a source of substantive rights."

Sameric Corp. of Delaware v. City of Philadelphia, 142 F.3d 582, 590 (3d Cir. 1998). Rather, it provides a remedy for violations

of federal constitutional or statutory rights. Kalina v. Fletcher, 522 U.S. 118, 123 (1997). Plaintiffs here must demonstrate that the URA creates an individually enforceable right. See City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 125 S. Ct. 1453, 1458 (2005).

There exists a private cause of action for violation of § 4625(a) of the URA. Pietroniro v. Borough of Oceanport, 764 F.2d 976, 980 (3d Cir. 1985). The URA, however, provides that "[t]he provisions of section 4651 of this title create no rights or liabilities ..." 42 U.S.C. § 4602(a). Interpreting this language, courts have consistently held that § 4651 does not provide an individually enforceable right. See Will-Tex Plastics Mfg., Inc. v. Dep't of Housing and Urban Dev., 346 F. Supp. 654, 658 (E.D. Pa. 1972); see also United States v. 35.87 Acres of Land, No. Civ.A. 98-2177, 1999 WL 391395, at *5 (E.D. Pa. May 26, 1999). Since § 4651 provides no individually enforceable right, § 4655 cannot be said to do so. Therefore, plaintiffs' claims under Count I, to the extent they are based upon §§ 4651 and 4655, will be dismissed.

Defendants assert that the remaining claim pursuant to § 4625 is time-barred. Section 1983 claims are subject to Pennsylvania's two-year statute of limitations for personal injury actions. Sameric, 142 F.3d at 599; see also 42 PA. CONS. STAT. ANN. § 5524. Claims under § 1983 accrue when plaintiffs "knew or should have known of the injury upon which [their] action[s] [are] based." Sameric, 142 F.3d at 599. If, however,

defendants' conduct constitutes a continuing violation, plaintiffs' "action is timely so long as the last act evidencing the continuing practice falls within the limitations period; in such an instance, the court will grant relief for the earlier related acts that would otherwise be time barred." Brenner v. Local 514, United Bhd. of Carpenters and Joiners of Am., 927 F.2d 1283, 1295 (3d Cir. 1991) (citation omitted).

Isolated or sporadic acts of a defendant do not constitute a continuing violation. West v. Philadelphia Elec. Co., 45 F.3d 744, 755 (3d Cir. 1995). Rather, the injurious acts must be part of an on-going pattern. Id. In making this distinction we must consider the following non-exhaustive list of factors:

(1) subject matter--whether the violations constitute the same type of discrimination, tending to connect them in a continuing violation; (2) frequency--whether the acts are recurring or more in the nature of isolated incidents; and (3) degree of permanence--whether the act had a degree of permanence which should trigger the plaintiff's awareness of and duty to assert his/her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate.

Cowell v. Palmer Twp., 263 F.3d 286, 292 (3d Cir. 2001).

Although the continuing violations doctrine has most frequently been applied in the employment discrimination context, its application in other contexts is not precluded. Id.

Defendants assert that plaintiffs knew in 2002 that their business was declining due to the planned redevelopment.

Because the complaint was not filed until October 11, 2005, defendants argue that it is time-barred. Plaintiffs maintain that defendants continually violated their rights by revising and publicizing the redevelopment plan throughout 2002 and 2003. They further contend that they "did not suffer actionable harm, at the earliest, until their business was threatened with the seizure of collateral and foreclosure, which did not occur until November and December 2003, and more likely in 2004 when the RDA disclosed its intent to acquire the Munozes' property." (Pls.' Compl. 23).

Plaintiffs claim that the defendants violated the URA by, in essence, moving too slowly to obtain their property through formal acquisition procedures while publicizing the redevelopment project. The actions or inactions complained of to support the URA claim occurred throughout 2002 and 2003 while the defendants were refining and promoting the redevelopment project. The fact that plaintiffs lost their business through Sovereign Bank's foreclosure proceedings sometime in November or December of 2003 is irrelevant to the continuing violation doctrine because the focus must be "upon the time of the [defendants' injurious] acts, not upon the time at which the consequences of the acts became most painful." Brenner, 927 F.2d at 1296 (quoting Delaware State College v. Ricks, 449 U.S. 250, 258 (1980) (emphasis omitted) (brackets added)).

Plaintiffs filed their complaint, as noted above, on October 11, 2005. According to the complaint, the defendants

promoted the redevelopment plan and delayed acquiring the plaintiffs' property through sometime into 2003. The complaint does not specify whether the last act evidencing this continuing practice ended before or after October 11, 2003. We simply do not have enough information at this early stage of the case to allow us to rule on the statute of limitations defense. Consequently, we will deny without prejudice the motion of defendants to dismiss as untimely plaintiffs' claim under § 4625.

II.

In Count II of their complaint, plaintiffs seek relief under § 1983 on the ground that the defendants took their property without just compensation in violation of Pennsylvania's Eminent Domain Code, 26 PA. STAT. ANN. § 1-101 et seq. They further allege that defendants actions violated Pennsylvania's Urban Redevelopment Law, 35 PA. STAT. ANN. § 1701 et seq. Actions under § 1983, however, may only be brought to enforce violations of federal constitutional and federal statutory rights. Kalina, 522 U.S. at 123. Plaintiffs may not enforce violations of their rights under state law pursuant to § 1983. See id. Because they have not stated a claim upon which relief can be granted, their claims under Count II must be dismissed.

III.

Plaintiffs allege in Count III of their complaint that by causing the value of their business to decline, defendants took their property without just compensation in violation of the Fifth Amendment. Defendants assert that this claim is not ripe

for judicial review. The ripeness doctrine addresses the point at which a proper party may bring an action and affects justiciability. Taylor Inv., Ltd. v. Upper Darby Twp., 983 F.2d 1285, 1290 (3d Cir. 1993); Armstrong World Indus. v. Adams, 961 F.2d 405, 411 (3d Cir. 1992). While defendants present this argument as part of their motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss for failure to state a claim upon which relief can be granted, it is more properly considered on a motion to dismiss for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Armstrong, 961 F.2d at 410.

In Williamson Co. Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 195 (1985), the Supreme Court held that a takings claim under the federal constitution is not ripe if a plaintiff has not sought compensation through the procedures a State has provided for doing so. The Court reasoned that the "Fifth Amendment does not proscribe the taking of property; it proscribes the taking of property without just compensation." Id. at 194. Until a property owner has unsuccessfully attempted to obtain just compensation through the State's procedures, a Fifth Amendment takings claim is not ripe for adjudication. Id. at 194-95.

Under Pennsylvania law, a property owner may bring an action for inverse condemnation to obtain just compensation for a de facto taking. 26 PA. STAT. ANN. § 1-502(e). A de facto taking occurs when "an entity clothed with the power of eminent domain

has, by even a non-appropriative act or activity, substantially deprive[d] an owner of the beneficial use and enjoyment of his property." Genter v. Blair County Convention and Sports Facilities Auth., 805 A.2d 51, 55 (Pa. Commw. Ct. 2002).

Plaintiffs concede that they have not utilized Pennsylvania's inverse condemnation proceedings. They argue, however, that the inverse condemnation procedures were not available long enough for plaintiffs to take advantage of them.

Only an owner of property may bring an action for inverse condemnation. 26 PA. STAT. ANN. §§ 1-201(2), 1-502(e). Plaintiffs assert that shortly after they had enough evidence to support an inverse condemnation action Sovereign Bank had initiated foreclosure proceedings and plaintiffs were no longer owners of the property. The right to condemnation damages, however, belongs to the legal owner at the time of the taking. Synes Appeal, 164 A.2d 221, 223 (Pa. 1960); Florek v. Com. Dep't of Transp., 493 A.2d 133, 136 (Pa. Commw. Ct. 1985); see also Appeal of Kraus, 618 A.2d 1070 (Pa. Commw. Ct. 1992). We note that the statute of limitations for such an action is 21 years. 42 PA. CONS. STAT. ANN. § 5530(a)(3). Therefore, Pennsylvania's inverse condemnation proceedings are available to the plaintiffs.

Because they have not sought compensation through available state procedures, their takings claim in Count III under the Fifth Amendment is not ripe and will be dismissed for lack of subject-matter jurisdiction. Armstrong, 961 F.2d at 410.

IV.

Plaintiffs also assert a § 1983 claim in Counts IV and V that the defendants' failure to take prompt action to purchase their property by eminent domain after creating a general awareness of the redevelopment project violated their substantive and procedural due process rights. Defendants contend that these claims are also not ripe. As noted above, we will consider this argument pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure to dismiss for lack of subject-matter jurisdiction. Armstrong, 961 F.2d at 410.

The substantive component of the Due Process Clause of the Fourteenth Amendment bars certain "arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" Leamer v. Fauver, 288 F.3d 532, 546 (3d Cir. 2002). A plaintiff must establish that he has a property interest to which substantive Due Process protections apply and that a governmental actor's behavior in depriving him of the interest was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." Desi's Pizza, Inc. v. City of Wilkes-Barre, 321 F.3d 411, 427 (3d Cir. 2003) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 847 n.8 (1998)).

Substantive due process claims in land-use cases are subject to a "finality rule." Taylor, 983 F.2d at 1292; see also Williamson, 473 U.S. at 199. Land-use planning authorities "must fully and finally determine, whether, and to what extent, a

deprivation has occurred before a federal claim is mature." Taylor, 983 F.2d at 1293; see also Williamson, 473 U.S. at 200. Until plaintiffs complete the process for seeking relief under the Pennsylvania Eminent Domain Code, we are unable to determine whether defendants' actions were arbitrary and capricious. See Taylor, 983 F.2d at 1292.

The finality rule also applies to procedural due process claims. Id. To state such a cause of action, plaintiffs must demonstrate that the defendants deprived them of a protected property interest without notice and an opportunity to be heard. Cleveland Board of Educ. v. Loudermill, 470 U.S. 532, 542 (1985).

The case at bar is similar to one before my colleague, Judge Berle Schiller, in Save Ardmore Coalition v. Lower Merion Twp., No. Civ.A. 05-1668, 2005 WL 3021087 (E.D. Pa. Nov. 9, 2005). In Save Ardmore, plaintiffs opposed a redevelopment project in Ardmore, Pennsylvania, that was still in the planning stages. In particular, plaintiffs complained that the defendants violated their right to procedural due process by proceeding with the redevelopment project without affording them an adversarial hearing. By the time the complaint was filed the defendants had designated an area as blighted, adopted a redevelopment plan, earmarked \$6 million of federal funding for the redevelopment, sent notices of potential condemnation to property owners, and examined the feasibility of the redevelopment. On a motion to dismiss, the court found that there had not been sufficient

finality in the decision-making of the project to permit review of the procedural due process claim. Id. at *10.

According to the complaint here, the defendants have not come to any decision, let alone a final one, regarding "whether, and to what extent, a deprivation has occurred." See Taylor, 983 F.2d at 1293. No Declaration of Taking has issued. Defendants have, so far, merely planned the redevelopment. Pennsylvania's Eminent Domain Code provides a mechanism by which plaintiffs may obtain a final decision from the defendants in situations where, as here, they assert that they have suffered a compensable injury and no declaration of taking has been issued. 26 PA. STAT. ANN. § 1-502(e). By taking advantage of the procedure for an appointment of viewers, plaintiffs can obtain a final agency determination as to whether they were deprived of their property by defendants' advertisement of the redevelopment plan, defendants' delay in acquiring the property, and plaintiffs' subsequent loss of business revenue. See e.g., Com. Dept. of Transp. v. DiFurio, 555 A.2d 1379 (Pa. Commw. Ct. 1989); Gamma Swim Club, Inc. v. Com. Dept. of Transp., 505 A.2d 342 (Pa. Commw. Ct. 1986). Williamson and Taylor require that plaintiffs do so before pursuing due process claims in this court. 983 F.2d at 1292; see also 473 U.S. at 199.

For the reasons set forth above, plaintiffs' claims in Counts IV and V of the complaint for violations of their due process rights are not ripe and will be dismissed.

V.

Finally, defendant FCDC argues that it should be dismissed as a defendant on the ground that it is not a state actor. Under § 1983, defendants must have acted "under color of law." Lake v. Arnold, 112 F.3d 682, 689 (3d Cir. 1997). At this early stage of the case, the record is totally undeveloped as to whether FCDC can "fairly be said to be a state actor." Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937 (1982); Lake, 112 F.3d at 689. Therefore, the motion of FCDC to dismiss on the ground that it is not a state actor will be denied without prejudice.

