

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

RASHID EL MALIK & :
ROSALIND EL MALIK : CIVIL ACTION
 :
v. :
 :
CITY OF PHILADELPHIA & : No. 06-1708
DEP'T OF LICENSE & INSPECTION :

MEMORANDUM

Padova, J.

July 26, 2006

This action arises out of the demolition of Plaintiffs' real property in 2005. Plaintiff Rashid El Malik, acting pro se on behalf of himself and his wife, Plaintiff Rosalind El Malik, filed a Complaint in the Court of Common Pleas of Philadelphia County, naming the City of Philadelphia ("the City") and the Department of License and Inspection ("the Department") as Defendants. The matter was subsequently removed to this Court, and the Defendants filed the instant Motion to Dismiss. For the reasons that follow, the Court grants the Motion in part and denies it in part.

I. BACKGROUND

The Complaint alleges the following facts. Plaintiffs, who reside in Palos Verdes Estate, California, own three properties in Philadelphia: a two-story dwelling at 28 North 59th Street, a two-story commercial/residential building at 29 North 59th Street, and a two-apartment commercial/residential complex at 30 North 59th Street. (Compl. at 2:6-12 & n.1.) In February 2005, Plaintiffs were inspecting their Philadelphia properties when they noticed red markings on the properties; they did not see any postings on the properties reporting that the buildings were in violation of city codes. (Id. at 2:13-15.) Plaintiffs contacted the City "Building and Inspection Department" to inquire about the reason for the markings; they were referred to Norman Mason of

the “Neighborhood Transfer Intuitive [sic],” who informed them that the buildings were scheduled for demolition in a few days. (Id. at 2:15-18.) Plaintiffs had not received any notice of the demolition. (Id. at 2:18-19.) Mr. Mason explained that letters had been sent to Plaintiffs’ address at 2306 Palos Verdes Drive informing Plaintiffs of the condition of the structures. (Id. at 2:20-22.) Plaintiffs did not reside at that address, but had moved and had informed the City of their current address. (Id. at 2 n.1.) Mr. Mason stated that the City did not have Plaintiffs’ current address. (Id. at 2:24-26.)

Plaintiffs requested to speak with Mr. Mason’s supervisor, and spoke to Mr. Daniel Quinn of the “contractual structure unit.” (Id. at 3:1-2.) Mr. Quinn stated that only his supervisor, Mr. Stanly Robinson, would have the authority to stop the demolition. (Id. at 3:2-4.) Plaintiffs then contacted Mr. Robinson to explain that they had never received any notice of the impending demolition. (Id. at 3:4-5.) Mr. Robinson stated that “he would see what he could do,” and referred Plaintiffs to his supervisor, Deputy Commissioner Eileen Evans.¹ (Id. at 3:5-7.) Plaintiffs left a message on Evans’s answering machine informing her that they did not receive notice of the demolition; she never returned the phone call. (Id. at 3:7-9.)

On March 3, 2005, Plaintiffs sent certified letters to each of the above-named individuals, requesting that the Department terminate the scheduled demolition and set up a meeting between the building inspector and the Plaintiffs. (Id. at 3:10-12, Ex. C.) Plaintiffs explained that, if they could not repair the properties, they would have the buildings removed at their own expense. (Id. at 3:11-12, Ex. C.) In response, on March 25, 2005 Evans sent three certified letters, corresponding to each

¹Although the Complaint refers to Ms. Evans as “Arlene Evans,” a letter from the City attached as Exhibit C to the Complaint indicates that the Deputy Commissioner’s name is Eileen Evans and that she is also the Director of the Contractual Services Unit. (Compl. Ex. C.)

of Plaintiff's three Philadelphia Properties. (Id. at 3:13-15, Ex.C.) Each mailing contained a "final" notice dated November 29, 2003, declaring the premises imminently dangerous. (Id. Ex. C.) Each letter was addressed to Plaintiffs' current address. (Id.) Each notice specified the actions the owner could take: the owner was ordered to immediately repair or demolish the said premises to correct the listed violations, or the City would demolish the structure; the owner could also appeal the violation by applying to Boards Administration within 5 days of the date of the notice; the owner was directed to call the Contractual Services Unit at 215-686-2582 if it had any questions regarding the notice. (Id.) On April 1, 2005, Plaintiffs wrote to Ms. Evans to request an additional sixty days to "secure" the properties. (Id. at 3 n.3, Ex. C.) Plaintiffs received no response. (Id. at 4 n.3). The properties were thereafter demolished. (Id. at 4:15.)

The Complaint asserts three claims against both Defendants: a claim brought pursuant to 42 U.S.C. § 1983 for deprivation of procedural due process, substantive due process, and equal protection of the law (Count 1); a claim brought pursuant to the Due Process Clause of the Fifth Amendment (Count 2); and, in the alternative, a trespass claim brought pursuant to state law (Count 3). Defendants have moved to dismiss all Counts of the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

II. LEGAL STANDARD

When deciding a motion to dismiss pursuant to Rule 12(b)(6), the court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939, 944 (3d Cir. 1985). A pro se complaint is "held 'to less stringent

standards than formal pleadings drafted by lawyers’,” Hughes v. Rowe, 449 U.S. 5, 9 (1980) (quoting Haines v. Kerner, 404 U.S. 519, 520 (1979)), and “should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Id. at 10 (citing Haines, 404 U.S. at 520-21).

III. DISCUSSION

As an initial matter, all claims against the Department of License and Inspection must be dismissed because the Department is not an independent corporate entity capable of being sued. 53 Pa. Cons. Stat. Ann. § 16257; Glim v. City of Philadelphia, 613 A.2d 613, 616 (Pa. Commw. Ct. 1992); Gremo v. Karlin, 363 F. Supp. 2d 771, 780 (E.D. Pa. 2005).² The Court thus dismisses the Department as a Defendant and analyzes Plaintiffs’ claims as against the City only.

A. Section 1983 (Count 1)

In Count 1, brought pursuant to 42 U.S.C. § 1983, Plaintiffs allege that the Defendants deprived them of their procedural and substantive due process rights, as well as their right to equal protection in violation of the Fourteenth Amendment.³ The City moves to dismiss this Count on the grounds that the Complaint does not allege that the City itself caused the complained-of injury, and the City cannot be held vicariously liable for the actions of its employees under § 1983.⁴ In order

²The relevant statute provides: “No [department of the City of Philadelphia] shall be taken to have had, since the passage of the act to which this is a supplement, a separate corporate existence, and hereafter all suits growing out of their transactions . . . shall be in the name of the city of Philadelphia.” 53 Pa. Cons. Stat. Ann. § 16257.

³Although the Complaint does not point to the Fourteenth Amendment, the Court concludes that this is the proper source of the constitutional claims asserted by the Plaintiffs.

⁴Although Plaintiffs do not explicitly argue that they intended to sue the individual City employees named in the Complaint, nor have they requested leave to amend to add parties, there are several indications that this was their intent. First, they argue in their response to the motion to

to state a claim against a municipality under § 1983, a plaintiff must allege more than an unconstitutional injury suffered at the hands of a municipality’s employees. Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 694 (1978). “[T]he court must determine not only ‘whether plaintiff’s harm was caused by a constitutional violation,’ but also ‘if so, whether the city is responsible for that violation.’” Gremo, 363 F. Supp. 2d at 791 (quoting Collins v. City of Harker Heights, 503 U.S. 115, 120-21 (1992)).

1. Municipal Liability

A municipality may be sued under § 1983 if it is alleged to have caused a constitutional tort through an official policy or governmental custom. Brennan v. Norton, 350 F.3d 399, 427 (3d Cir. 2003) (citing Monell, 436 U.S. at 690-91). Liability may be based on a single decision by an individual with “policy making authority rendering his or her behavior an act of official government policy.” McGreevy v. Stroup, 413 F.3d 359, 367 (3d Cir. 2005) (citing Pembaur v. City of Cincinnati, 475 U.S. 469, 480-81 (1986)). The determination of who is a “policymaker” in this sense is governed by state law. Andrews v. City of Philadelphia, 895 F.2d 1469, 1481 (3d Cir. 1990) (citing City of St. Louis v. Praprotnik, 485 U.S. 112, 124 (1988)).

The City correctly argues that the Complaint does not allege any facts in support of a theory of municipal liability based on a formal policy. In fact, the Plaintiff argues that the City employees acted in violation of the City’s official procedures. (Pl.’s Resp. at 4.) Nor does the Complaint

dismiss that the city is liable because its employees are liable—reflecting a misunderstanding of the nature of municipal liability under § 1983. Second, the caption of the case and the Civil Cover Sheet read “City of Philadelphia, Department of Licenses and Inspection, *et al.* (Compl. at 1 (emphasis added).) Finally, the Complaint refers to the individuals as “defendants.” (Compl. at 3:10 (“[P]laintiffs then sent Certified letters to each of the defendants requesting them to stop the demolition and allow them to meet with the inspector at the properties.”))

contain any allegations of governmental custom such as a pattern and practice of unconstitutional conduct. See Beck v. City of Pittsburgh, 89 F.3d 966, 971-72 (3d Cir. 1996) (defining custom as official practice that is “so permanent and well-settled’ as to virtually constitute law” (quoting Andrews, 895 F.2d at 1480)). Construed liberally in light of the pro se nature of its filers, however, the Complaint alleges that Deputy Commissioner Eileen Evans was the highest official in the Department and had the discretion to suspend the demolition, and was thus a final decisionmaker responsible for setting policy in this particular governmental sphere. Accordingly, her allegedly deliberate failure to provide adequate procedures to protect Plaintiffs’ property rights despite her knowledge of the inadequate notice of the code violations could constitute an act of official government policy upon which municipal liability may be grounded.

2. Constitutional Violations

In order to state a claim under § 1983, the Complaint must also contain factual allegations sufficient to support the theory that Evans’s actions or omissions caused a deprivation of Plaintiffs’ Fourteenth Amendment rights to procedural due process, substantive due process, and/or equal protection.⁵

a. Procedural Due Process

Procedural due process normally requires that a “deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.” Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982) (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)). The Court first asks whether the Complaint alleges

⁵The Court notes that Defendants argue only that the City cannot be liable under Monell; they have not addressed the merits of Plaintiffs’ allegations that they suffered an unconstitutional injury.

the deprivation of a protected property interest; next, it must determine whether the procedures available provided the plaintiff with due process of law. See Alvin v. Suzuki, 227 F.3d 107, 116 (3d Cir. 2000). As there is no real question that the Plaintiffs' ownership interest in real property merits the procedural protections of due process of law, see United States v. James Daniel Good Real Property, 510 U.S. 43, 49 (1993), the only remaining question is whether constitutionally adequate process was available to the Plaintiffs.

Plaintiffs contend that the City deprived them of procedural due process because the notice of the code violations was untimely, and they were consequently denied the opportunity to repair the premises or contest the violations. The Complaint demonstrates that Plaintiffs received formal notice of the code violations prior to the demolition of the properties, and there are no allegations that Plaintiffs attempted to appeal the violations by following the procedures outlined in the notice. However, Plaintiffs could not contest the decision because the notices were delivered over a year after their alleged date of issuance and the window of time for filing an appeal had passed. See Philadelphia Code § 4-A801.2 ("Appeals from unsafe or imminently dangerous designations by the Department shall be filed within 5 days of the date of such notice.") Thus, regardless of whether a predeprivation hearing is constitutionally required in this situation,⁶ Plaintiffs were allegedly effectively deprived of any method of contesting the violations, and thus have stated a claim for a

⁶In some cases, such as emergencies, predeprivation notice and hearing is not required. See Boddie v. Connecticut, 401 U.S. 371, 379 (1971); Fanning v. Montgomery County Children & Youth Servs., 702 F. Supp. 1184, 1189 (E.D. Pa. 1988) ("Although persons may ordinarily expect an opportunity to be heard prior to an adverse governmental decision regarding a substantial interest, post-deprivation process is appropriate where countervailing state interests are of an unquestionably strong nature" (citing Mackey v. Montrym, 443 U.S. 1 (1979))). The Court notes, however, that the Complaint alleges that no emergency situation existed, as evidenced by the lengthy passage of time from the date of the issuance of the notices to the demolition of the properties. (Compl. at 5:5-13.)

deprivation of procedural due process. See Alvin, 227 F.3d at 118 (“When access to procedure is absolutely blocked . . . the plaintiff need not pursue them to state a due process claim.” (citations omitted)). The Court finds, accordingly, that the Complaint states a claim against the City pursuant to § 1983 for a deprivation of the constitutional right to procedural due process.

b. Substantive Due Process

To state a § 1983 substantive due process claim, a plaintiff must allege (1) the deprivation of a fundamental property interest, Nicholas v. Pennsylvania State Univ., 227 F.3d 133, 140 (3d Cir. 2000); and (2) that the government’s deprivation of that property interest shocks the conscience. See United Artists Theatre Circuit, Inc. v. Twp. of Warrington, 316 F.3d 392, 399 (3d Cir. 2003) (“[T]he substantive component of the Due Process Clause is violated by executive action *only when it can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.*” (quoting County of Sacramento v. Lewis, 523 U.S. 833, 847 (1998)) (internal quotations omitted)). The use and enjoyment of real property owned by the plaintiff qualifies for protection under substantive due process. See DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592, 600-01 (3d Cir.1995), overruled on other grounds by United Artists Theatre Circuit, 316 F.3d at 399-402. The Complaint alleges that Plaintiffs’ properties presented no danger to the public, as evidenced by the fact that the City waited over a year to remedy the code violations. The demolition of property without any justification at all would be conscience-shocking executive action for purposes of the Due Process Clause. The Court thus finds that the Complaint states a claim against the City pursuant to § 1983 for a deprivation of the Fourteenth Amendment right to substantive due process.

c. Equal Protection

In order to state a § 1983 claim arising under the Equal Protection Clause of the Fourteenth

Amendment, plaintiffs must allege that they “received different treatment from that received by other individuals *similarly situated*.” Shuman v. Penn Manor Sch. Dist., 422 F.3d 141, 151 (3d Cir. 2005) (citing Andrews, 895 F.2d at 1478). The Complaint is devoid of allegations supporting a claim of discrimination, and thus the Court finds that it fails to state a claim against the City pursuant to § 1983 for a deprivation of the Fourteenth Amendment right to equal protection.

Accordingly, the Motion to Dismiss is granted as to Count 1 to the extent that it asserts a claim based on a violation of the Equal Protection Clause of the Fourteenth Amendment; the Motion is denied to the extent that Count 1 asserts claims based on violations of the procedural and substantive components of the Due Process Clause of the Fourteenth Amendment.

B. Fifth Amendment Claim (Count 2)

In Count 2, Plaintiffs allege that the Defendants deprived them of due process in violation of the Fifth Amendment to the United States Constitution.⁷ The City argues that Count 2 must be dismissed because the Fifth Amendment is applicable only to the federal government. See Fischer v. Driscoll, 546 F. Supp. 861, 863 (E.D. Pa. 1982) (“It is axiomatic that a plaintiff seeking relief pursuant to the Fifth Amendment must complain of federal governmental action.”). The allegations in Count 2 are directed at the government of the City of Philadelphia, not the federal government. Consequently, the Complaint cannot state a claim upon which relief can be granted as to Count 2. Plaintiffs request leave to amend this Count to plead a violation of the Due Process Clause of the Fourteenth Amendment. As amended, Count 2 would be duplicative of Count 1, in which Plaintiffs allege that the City “obstructed [P]laintiff[s]’ due process by demolishing their properties,” (Compl.

⁷Plaintiffs have clarified that Count 2 alleges a violation of the Due Process Clause, as opposed to the Takings Clause, of the Fifth Amendment. (Pl.’s Resp. Mot. Dismiss at 3.)

at 5:17-18); the amendment would render Count 2 superfluous. Accordingly, the Motion to Dismiss is granted as to Count 2.

C. State Law Trespass Claim (Count 3)

In Count 3, Plaintiffs allege in the alternative that the City trespassed on their properties and damaged them. The City argues that this claim must be dismissed because the City is immune from common law tort claims. Under the Pennsylvania Political Subdivision Tort Claims Act (the “Tort Claims Act”), the City is immunized from claims for damages on account of an injury to person or property. See 42 Pa. Cons. Stat. Ann. § 8541; Kiley v. City of Philadelphia, 645 A.2d 184, 185 (Pa. 1994).⁸ Plaintiffs argue that the real property exception to governmental immunity, 42 Pa. Cons. Stat. Ann. § 8542(b)(3), applies in this case because the City took possession or control of their properties. That exception provides that the negligent act of a local agency or its employees may result in the imposition of liability on that agency where the act is “the care, custody, or control of real property in the possession of the local agency.” 42 Pa. Const. Stat. Ann. § 8542(b)(1), (3).

The exceptions to governmental immunity are narrowly construed. Mascaro v. Youth Study Ctr., 523 A.2d 1118, 1123 (Pa. 1987). Assuming that the City’s temporary control of the premises is sufficient to constitute “possession” of the property within the meaning of the statute, see City of Pittsburgh v. Estate of Chris Stahlman, 677 A.2d 384, 387 (Pa. Commw. Ct. 1996), the real property exception is applicable “only where the 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

⁸In this case, Plaintiffs seek unspecified equitable relief as well as damages, and the Tort Claims immunizes the City against damage claims only. See Rawlings v. Bucks County Water & Sewer Auth., 702 A.2d 583, 586 (Pa. Commw. Ct. 1997). It is difficult to conceive of meaningful equitable relief in a case such as this, however, where the City has already demolished the properties. Accordingly, the Court assumes that the Plaintiffs are seeking damages only.

it may reasonably be foreseen to be used.” Moles v. Borough of Norristown, 780 A.2d 787, 791 (Pa. Commw. Ct. 2001) (citing Mascaro, 523 A.2d at 1124). The Complaint alleges that the City intentionally entered Plaintiffs’ real properties and demolished them. In this case, where the facts alleged cannot support a claim that Plaintiffs’ injury arose from acts or omissions of the City or its employees which caused a dangerous condition on the property, the exception cannot apply. See Estate of Van Der Leer v. City of Philadelphia, No. Civ. A. 03-4324, 2004 WL 1336315, at *4 (E.D. Pa. June 15, 2004) (holding that real property exception does not apply to City’s negligent demolition of property). Accordingly, the Court finds that the Tort Claims Act applies to immunize the City from damages arising from its demolition of Plaintiffs’ properties, and the Motion to Dismiss is granted as to Count 3.

D. Rosalind El Malik’s Claims

The City argues that all of Plaintiff Rosalind El Malik’s claims must be dismissed because Rashid El Malik, a non-lawyer, may not represent his wife, Rosalind El Malik. Pro se plaintiffs may not represent other plaintiffs in federal proceedings. See Collingsgru v. Palmyra Bd. of Education, 161 F.3d 225, 231-32 (3d Cir. 1998) (holding that parents could not proceed pro se on behalf of their children under the IDEA and noting the long-standing reluctance to allow non-lawyers to represent others in federal court). Plaintiffs concede that Rashid El Malik may not represent his wife in this case and request leave to amend to clarify that Rosalind El Malik is proceeding pro se on her own behalf. The Court is obligated to grant leave to amend when the amendment is not sought in bad faith and would not be futile. Alston v. Parker, 363 F.3d 229, 235 (3d Cir. 2004) (“[I]f a complaint is vulnerable to 12(b)(6) dismissal, a District Court must permit a curative amendment, unless an amendment would be inequitable or futile.” (citing Grayson v. Mayview State Hosp., 293 F.3d 103,

108 (3d Cir. 2002))). “In assessing ‘futility,’ the district court applies the same standard of legal sufficiency as applies under Rule 12(b)(6).” *Id.* (citing *Glassman*, 90 F.3d at 623). That is, the Court must determine whether the claims would survive a 12(b)(6) motion if Plaintiff were to cure the defects. In this case, a curative amendment would solve the legal deficiency of Rosalind El Malik’s remaining claim in Count 1 against the City. Consequently, the Motion to Dismiss is granted without prejudice as to Rosalind El Malik’s claim against the City in Count 1 of the Complaint, and her request for leave to amend this claim is granted.

IV. CONCLUSION

For the foregoing reasons, the Motion is granted with respect to Counts 2 and 3 in their entirety; the claim asserted for a violation of the Equal Protection Clause in Count 1; all claims against the Department of License and Inspection; and all claims asserted by Rosalind El Malik. The Court denies the Motion in all other respects.⁹

An appropriate order follows.

⁹Accordingly, only the claims asserted against the City by Rashid El Malik in Count 1 for violations of procedural and substantive due process remain.

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

RASHID EL MALIK & ROSALIND EL MALIK	:	
	:	CIVIL ACTION
	:	
v.	:	
	:	
CITY OF PHILADELPHIA & DEP'T OF LICENSE & INSPECTION	:	No. 06-1708
	:	

ORDER

AND NOW, this 26th day of July, 2006, upon consideration of the “Motion to Dismiss Plaintiffs’ Complaint” filed by Defendants City of Philadelphia and Department of License and Inspection (Doc. No. 2) and Plaintiffs’ response thereto, **IT IS HEREBY ORDERED** that said Motion is **GRANTED IN PART** and **DENIED IN PART** as follows:

1. Said Motion is **GRANTED** with respect to Plaintiffs’ claims against the Department of License and Inspection, and the Department of License and Inspection is **DISMISSED** as a Defendant in this matter.
2. Said Motion is **GRANTED** with respect to all claims brought by Rosalind El Malik, and these claims are **DISMISSED** without prejudice.
3. Said Motion is **GRANTED** with respect to Counts 2 and 3, and these claims are **DISMISSED**.
4. Said Motion is **GRANTED** with respect to Count 1 to the extent that Count 1 asserts a claim of a violation of the Equal Protection Clause of the Fourteenth Amendment, and this claim is **DISMISSED**.
4. Said Motion is **DENIED** in all other respects.
5. Plaintiffs may file an amended complaint, curing the deficiencies of Rosalind El

Malik's claim against the City in Count 1, within 20 days of the date of this Order.

BY THE COURT:

s/ John R. Padova
John R. Padova, J.