

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

409 SMILEY'S INC et al.,	:	
	:	
Plaintiffs,	:	CIVIL ACTION
	:	NO. 00-1269
v.	:	
	:	
TOWNSHIP OF RIDLEY, et al.	:	
	:	
Defendants.	:	

MEMORANDUM

BUCKWALTER, J.

June 29, 2000

Presently before the Court is the Defendants' Motion to Dismiss. For the reasons stated below, the Motion is Denied.

I. BACKGROUND

Plaintiffs filed the Complaint in this civil rights action on March 8, 2000.¹ The substance of the Complaint is that the Defendants which include the Township of Ridley and many of its town officers, have violated their constitutional rights through a series of zoning actions.²

1. Plaintiffs include three corporations which all have their principal place of business at 409 Smiley Street, Crum Lynne, PA. 409 Smiley's, Inc. ("Smiley, Inc.") operates a restaurant/tavern ("Smiley's") on the premises that provides adult entertainment. Wilmarlie, Inc. ("Wilmarlie") holds legal title to the real estate located at 409 Smiley Street ("Property"). Namar, Inc. ("Namar") owns the liquor license at Smiley's.

2. The Defendants include the Township of Ridley, PA ("Ridley"), the Zoning Hearing Board of the Township of Ridley ("Zoning Hearing Board"), the Board of Commissioners for Ridley Township (the "Commissioners"); Anne E. Howanski ("Howanski"), the Township Manager; Peter J. Rohana ("Rohana"), the Township Solicitor; Michael P. Dignazio ("Dignazio"), the Solicitor of the Ridley Zoning Board; Lew Dipietro ("DiPietro"), a Zoning Board member; James Keegan ("Keegan"), a Zoning Board member; Gregory P. Lamonaca ("Lamonaca"), a Zoning Board member; James MaGinnis ("MaGinnis"), a Zoning Hearing Board member; George Reeder ("Reeder"), a Zoning Hearing Board member; Margaret A. Fetterole ("Fetterole"), a Zoning Hearing Board member; Paul A. Graf

(continued...)

The property at question is located at 409 Smiley Street in Ridley Township. The building is located in a C-1 Neighborhood Commercial Zoning District, and is operated by Plaintiffs as a tavern providing adult entertainment. The premises had previously been operated as a restaurant/tavern that provided adult entertainment as an incidental use under the name “Neno’s”. After the time that Neno’s began providing adult entertainment, Ridley passed an ordinance governing and regulating adult entertainment within the Township. Neno’s, although located in an area that did not allow adult entertainment, continued to operate because of its previous non-conforming use. Neno’s eventually closed in December 1998. Within a month, a new owner, Plaintiffs in this action, acquired the Property.

The Plaintiffs did not file a certificate of occupancy until May 26, 1999. During the interim, Plaintiffs allege that they applied for and were granted permits to effect renovations on the Property. They also claim to have paid \$42,000 in back real estate taxes and \$2,600 in back sewer liens owed by the previous owner. Ridley claims that it believed the non-conforming use had been abandoned, whereas the Plaintiffs allege that it was clear that they planned on continuing to provide adult entertainment. In either event, Ridley denied Plaintiffs’ Certificate of Occupancy. Within two days of the denial, Plaintiffs filed a mandamus action along with a request for a preliminary injunction in the Delaware County Court of Common Pleas (collectively, the “Mandamus Action”). The Honorable Joseph F. Battle (“Judge Battle”) decided this action by an Order directing Ridley to issue a Certificate of Occupancy. The Order

2. (...continued)
 (“Graf”), a member of the Board of Commissioners; James J. Pentimall (“Pentimall”), a member of the Board of Commissioners; Fiore Peticca (“Peticca”), a member of the Board of Commissioners; John J. Whelan (“Whelan”), a member of the Board of Commissioners; David J. White (“White”), a member of the Board of Commissioners; Sherry Zuppo (“Zuppo”), a member of the Board of Commissioners; Robert J. Willert (“Willert”), a member of the Board of Commissioners; and Thomas P. Gannon, a member of the General Assembly of Pennsylvania.

stated that it “should not be considered as a basis upon which Plaintiffs are entitled to expand the non-conforming use. Any issue of expansion lies within the Jurisdiction of the Zoning Hearing Board.”

On June 18, 1999, Ridley issued to Plaintiffs a Certificate of Occupancy for the Property. The Certificate contained several conditions, including that Plaintiffs;

- (1) Must obtain an Adult Entertainment License; and
- (2) Could not use a room designated for lap or couch dancing; and
- (3) Use a maximum of 12 dancers a day;
- (4) Limit adult entertainment to between the hours of 4-10 p.m.

Plaintiffs allege that Ridley had no authority to place conditions on the Certificate. When the Plaintiffs failed to comply with the conditions, Ridley sent them an Enforcement Notice explaining their violations. Plaintiffs appealed the Notice to the Zoning Hearing Board. On November 10, 1999, the Zoning Hearing Board issued a Memorandum Decision that struck two of the Certificate’s conditions and left two intact. The Zoning Hearing Board found that the prohibition on a designated lap dancing room and the requirement of obtaining a license were valid under Ridley’s ordinance. On the other hand, the limits placed on the hours of operation and number of dancers were held to be preempted by Pennsylvania Liquor Control Board regulations.³ Although these findings were appealed by Plaintiffs, Judge Battle upheld the decision of the Zoning Hearing Board in an Order dated April 7, 2000.

3. The Zoning Board essentially found that the hours of operation and number of dancers working at Smiley’s were not out of compliance with the pre-existing non-conforming use that had been authorized at Neno’s. As such, the regulations were pre-empted by the Liquor Control Board’s rules.

Plaintiffs allege that since Smiley's opened for business on June 18, 1999, uniformed police officers have harassed the establishment through daily inspections. The Plaintiffs state that they have completed the Adult Entertainment License. They also claim that the prohibition against the "private lap dancing room" is unconstitutionally vague.

Count I of the Complaint suggests that the Defendants have arbitrarily and capriciously created and enforced rules discriminatorily against Plaintiffs. Essentially, Count I is a § 1983 action for a violation of Plaintiffs' substantive due process and equal protection rights. Count II asks for a Declaration of the Court that the conditions imposed by Ridley infringe Plaintiffs' free speech rights. Count III argues that the conditions constitute an unlawful taking without just compensation.

II. LEGAL STANDARD

When deciding to dismiss a claim pursuant to Rule 12(b)(6) a court must consider the legal sufficiency of the complaint and dismissal is appropriate only if it is clear that "beyond a doubt ... the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." McCann v. Catholic Health Initiative, 1998 WL 575259 at *1 (E.D. Pa. Sep. 8, 1998) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). The court assumes the truth of plaintiff's allegations, and draws all favorable inferences therefrom. See, Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). However, conclusory allegations that fail to give a defendant notice of the material elements of a claim are insufficient. See Sterling v. SEPTA, 897 F.Supp 893, 895 (E.D. Pa.1995). The pleader must provide sufficient information to outline the elements of the claim, or to permit inferences to be drawn that these elements exist. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d. Cir. 1993). The Court must determine whether, under any

reasonable reading of the pleadings, the law allows the plaintiff a remedy. See, Nami v. Fauver, 82 F.3d 63, 65 (3d. Cir. 1996).

III. DISCUSSION

A. Subject Matter Jurisdiction

The Defendants first argue that the Court lacks subject matter jurisdiction over this matter according to Rooker-Feldman. The Rooker-Feldman doctrine provides that "federal district courts lack subject matter jurisdiction to review final adjudications of a state's highest court or to evaluate constitutional claims that are 'inextricably intertwined with the state court's [decision] in a judicial proceeding.'" Blake v. Papadakos, 953 F.2d 68, 71 (3d Cir.1992). When a plaintiff seeks to litigate a claim in a federal court, the existence of a state court judgment in another case bars the federal proceeding under Rooker-Feldman only when entertaining the federal court claim would be the equivalent of an appellate review of that order. See FOCUS v. Allegheny County Court of Common Pleas, 75 F.3d 834, 840 (3d Cir. 1996). For that reason, Rooker-Feldman applies only when, in order to grant the federal plaintiff the relief sought, the federal court must determine that the state court judgment was erroneously entered or must take action that would render that judgment ineffectual.

It does not appear, at this stage of the proceedings, that the issues sought to be litigated here are inextricably intertwined with the decisions made by Judge Battle in state court. Judge Battle found that the Zoning Hearing Board did not make an error of law in stating that two conditions attached to the Certificate of Occupancy were not expansions of the pre-existing non-conforming use. The state court did not decide whether Ridley's granting of a conditional permit violated Plaintiffs' constitutional due process, equal protection, free speech or property

rights. Adjudicating these rights in this Court will not require appellate-like review of the state court's decision. Therefore, the Court does not lack jurisdiction pursuant to Rooker-Feldman.

B. Substantive Claims

The standard on a motion to dismiss clearly favors the Plaintiffs. The Court must accept as true all allegations made. If under any scenario such facts could be proven true, the claim must survive. Plaintiffs have sufficiently alleged claims for violation of their constitutional rights under the First, Fifth and Fourteenth Amendments. Of course, proving these claim against both the township and the individual defendants will be another matter. But the Court finds that it would be premature to dismiss any of Plaintiffs' claims at this stage.

IV. CONCLUSION

The Plaintiffs have sufficiently alleged constitutional claims against the Defendants. Therefore, the Motion to Dismiss will be denied in its entirety.

An appropriate order follows.

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Defendants.	:	

ORDER

AND NOW, this 29th day of June, 2000, upon consideration of the Defendants' Motion to Dismiss (Docket No. 6), and the Plaintiffs' Response thereto (Docket No. 10); it is hereby **ORDERED** that the Motion is **DENIED**.

BY THE COURT:

RONALD L. BUCKWALTER, J.