

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

MAPLE PROPERTIES, INC. :
 :
 v. : CIVIL ACTION
 :
 TOWNSHIP OF UPPER PROVIDENCE, : NO. 00-4838
 BOARD OF SUPERVISORS OF UPPER :
 PROVIDENCE TOWNSHIP, JOHN F. :
 PEARSON, ROBERT N. MAUGER, and :
 HOWARD P. HUBER, Individually, :
 Supervisors Upper Providence :
 Township :

M E M O R A N D U M

WALDMAN, J.

September 12, 2001

Introduction

Plaintiff has asserted claims under 42 U.S.C. § 1983 for an alleged deprivation of property rights in violation of the guaranties of procedural and substantive due process and its right to equal protection arising from enactment by the Board of Supervisors of Upper Providence Township of Ordinance 384 which prohibited plaintiff's planned use of a property. Presently before the court is defendants' Motion to Dismiss on grounds of abstention and for failure to state a claim.¹

¹Dismissal for failure to state a claim is appropriate when it clearly appears that plaintiff can prove no set of facts to support the claim which would entitle her to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Robb v. Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984). Such a motion tests the legal sufficiency of a claim accepting the veracity of the claimant's allegations. See Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). A complaint may be dismissed when the facts alleged and the reasonable inferences therefrom are legally insufficient to support the relief sought. See Pennsylvania ex. rel. Zimmerman v. PepsiCo, Inc., 836 F.2d 173, 179 (3d Cir. 1988).

Factual Background

The pertinent facts as alleged by plaintiff are as follow.

Plaintiff is the equitable owner of a property located partially in the Borough of Collegeville ("Collegeville") and partially in the Township of Upper Providence ("Upper Providence"). Plaintiff executed a real estate purchase agreement with an intent to construct a drug store on the portion of the property located in Upper Providence as part of a comprehensive retail development.

Under the Upper Providence zoning ordinance in effect prior to May 3, 1999 (the "prior ordinance"), the Upper Providence portion of the property was zoned NC Neighborhood Convenience Commercial ("NCC"). The prior ordinance provided that certain retail uses, including drug stores, were permitted uses by right. Prior to May 3, 1999, plaintiff applied to Collegeville for zoning special exceptions and for land development approval. Collegeville granted both, but conditioned its approval in part on plaintiff's use of the portion of the property located in Upper Providence. The Supervisors of Upper Providence ("Supervisors") knew of plaintiff's application to Collegeville and were aware that the plan included a retail use planned for Upper Providence.

On March 16, 1999, the Upper Providence Township Manager sent a letter to the Montgomery County Planning Commission referencing plaintiff's property and requesting that the County Planning Commission evaluate rezoning the tract to Professional Business Office ("PBO") classification. Nothing in the minutes of the Supervisors' meetings prior to the date of the letter indicates that the Board discussed or authorized the letter. Based on the absence of a record of such discussion, plaintiff alleges that the Supervisors instructed the Township Manager to contact the Montgomery County Planning Commission in private and thus in violation of the Pennsylvania Open Meeting Law, 65 Pa. C.S.A. § 704 et seq. Plaintiff further alleges that the Supervisors had decided to rezone the property from NCC to PBO before sending the letter.

On April 23, 1999, plaintiff's engineers delivered the required preliminary land development plans to Upper Providence.² When the engineers requested a fee schedule for plaintiff's application, Upper Providence personnel informed the engineers that they did not know the required fees. The Upper Providence personnel promised that they would contact an appropriate official and then telephone the engineers about the necessary fees. No one from Upper Providence, however, contacted the engineers.

²Plaintiff does not state to whom or to where the plans were delivered.

A few days later, plaintiff's engineers went to the Township Building with the completed land use application and a blank check for the application fee. Upper Providence personnel again told them that they did not know the fee amount and that the Zoning Officer, the only person who had authority to determine the fee, was unavailable.

By letter dated April 28, 1999, plaintiff was advised that the plans for the property would not be accepted for filing.³ Plaintiff alleges that the Supervisors instructed Upper Providence personnel to refuse to accept plaintiff's plans and delay its application until after the passage of the Ordinance.

Twice in April 1999, advertisements in the Norristown Times Herald announced that a public hearing would be held on May 3, 1999 to consider the passage of Ordinance 384. The minutes of the Supervisors' meetings do not reflect that they ever discussed or authorized the advertisements at public meetings. Plaintiff alleges that the Supervisors privately instructed Upper Providence personnel to place the advertisements and thus violated Pennsylvania's Open Meeting Law.

On May 3, 1999, the Supervisors voted at a public meeting to pass Ordinance No. 384 (the "Ordinance") which changed the uses permitted by right on a tract which included plaintiff's

³The complaint does not specify the reason given, if any, for the Township's refusal to file plaintiff's plans.

property and effectively prohibited plaintiff's proposed retail use.⁴ Upper Providence never advised plaintiff of the pending zoning change. The minutes of prior Supervisors' meetings contain no mention of the Ordinance. They do not indicate that the Supervisors authorized a discussion of the issue of rezoning or a hearing on the Ordinance, or that the Supervisors publicly addressed either rezoning plaintiff's property or possible new zoning classifications for the property. Plaintiff alleges that the Supervisors thus deliberated in private about the specifics of rezoning plaintiff's property in violation of 65 Pa. C.S.A. § 704.

Had they been accepted, plaintiff's plans for the property might have been subject to the pending ordinance doctrine and treated under the pre-existing zoning. Plaintiff's plans and application would have conformed to the prior ordinance.

After the May 3, 1999 meeting, plaintiff challenged the enactment of the Ordinance under 53 P.S. § 10909.1 before the Upper Providence Zoning Hearing Board. The Board denied the challenge on June 15, 2000. Plaintiff then appealed to the Court of Common Pleas of Montgomery County. It appears that the appeal is pending.

⁴The Ordinance itself has not been provided and its exact scope is unclear from the pleadings.

Discussion

Plaintiff seeks a declaration that the Ordinance is unconstitutional insofar as it affects the development of his property in a manner permitted before May 3, 1999 and that it has a right to develop the property according to the zoning law existing before May 3, 1999. Plaintiff seeks to enjoin defendants from enforcing the Ordinance against it and also seeks an award of compensatory and punitive damages. Defendants seek dismissal on Younger abstention grounds or alternatively a stay under Colorado River. They also argue that in any event plaintiff's claims against the individual defendants and its punitive damage claims should be dismissed for failure to state a cognizable claim, and alternatively that the individual defendants are entitled to qualified immunity.

Abstention

The policies of Younger abstention are applicable to non-criminal state proceedings when important state interests are involved. See Middlesex County Ethics Comm. v. Garden State Bar Ass'n., 457 U.S. 423, 432 (1982); Marks v. Stinson, 19 F.3d 873, 881-82 (3d Cir. 1994). Younger does not apply, however, simply because there is a potential for conflicting judgments. See Acierno v. New Castle County, 40 F.3d 645, 655 n.13 (3d Cir. 1994); Marks, 19 F.3d at 882. Younger abstention is appropriate where "(1) there are ongoing state proceedings involving the

would-be federal plaintiffs that are judicial in nature; (2) the state proceedings implicate important state interests; and (3) the state proceedings afford an adequate opportunity to raise the federal claims." Id.

Plaintiff has pending actions for relief in the state courts, including an appeal of the land use decision. Land use is an important state interest. See Chez Sez III Corp. v. Township of Union, 945 F.2d 628, 633 (3d Cir. 1991); Musko v. McClandless, 1995 WL 262520, *4 (E.D. Pa. May 1, 1995). The second requirement is fulfilled when a plaintiff requests relief that challenges the validity of a land use ordinance or when a decision by the federal court would in effect be a review of the land use decision. See Gwynedd Properties, Inc. v. Lower Gwynedd Tp., 970 F.2d 1195, 1201 (3d Cir. 1992) (abstention appropriate when federal adjudication would result in de facto review of township's zoning decision currently under review in state courts).

Plaintiff's request for a declaration that the Ordinance is unconstitutional as applied to it and presumably anyone else who presented a proper application before May 3, 1999 for a use then permitted, and a corresponding injunction to prohibit its enforcement, challenges the validity of the ordinance at least as applied.

A declaratory judgment that plaintiff has the right to develop the property in accordance with the prior ordinance would dictate land use in the township. See Gwynedd Props., 790 F.2d at 1204 (abstention proper with regard to request for injunction prohibiting officials from interfering with developer's lawful use of property and from arbitrarily denying permits to which developer was entitled where such injunction would effectively nullify state proceedings); Pellegrino Food Prods. Co. v. City of Warren, 136 F. Supp. 2d, 391, 401 (W.D. Pa. 2000)(abstention warranted where requested injunction allowing plaintiff to build on property would preclude future zoning decisions based on proper factors). Plaintiff will have an adequate opportunity to present its constitutional claims in its pending land use appeal in the state court. See Nernberg v. City of Pittsburgh, 50 F. Supp.2d 437, 440 (W.D. Pa. 1999); Glen-Gery Corp. v. Lower Heidelberg Tp., 608 F. Supp. 1002, 1006 (E.D. Pa. 1985). Plaintiff does not argue otherwise. Abstention with respect to the claims for declaratory and injunctive relief is thus appropriate.

On the other hand, Younger does not preclude adjudication of plaintiff's claims for damages. To compensate plaintiff for economic loss caused by a capricious and malicious obstruction or delay in the processing of its application would not invalidate a land use ordinance or dictate land use in the

township.⁵

Abstention in the adjudication of these claims is unwarranted under Colorado River.

To abstain from adjudicating the remaining claims on Colorado River grounds, the court must first determine that the federal and state actions are duplicative. See Ryan v. Johnson, 115 F.3d 193, 197 (3d Cir. 1997); Rycoline Prods., Inc. v. C & W Unlimited, 109 F.3d 883, 890 (3d Cir. 1997). The state court actions involve the same parties and plaintiff is seeking essentially the same equitable relief.

Assuming that the federal and state actions are duplicative, the court still must consider other factors, i.e., whether either court has assumed jurisdiction over a res; the relative convenience of the forums; the desirability of avoiding piecemeal litigation; the order in which the courts obtained jurisdiction; whether state or federal law is controlling; and, whether the state proceeding is adequate to protect the parties' rights. Rycoline Prods., 109 F.3d at 890; Southeastern Pa. Transp. Auth. v. Board of Revision of Taxes, 49 F. Supp. 2d 778,

⁵A stay of the federal adjudication of these claims pending resolution of the current state proceedings may nevertheless be appropriate. See Crane v. Fauver, 762 F.2d 325, 329 (3d Cir. 1985) (stay of § 1983 damage claim appropriate where equivalent relief not available in ongoing state proceedings implicating Younger.) Also, the nature and extent of any damages may be significantly affected by the outcome of the pending land use litigation. The court will thus stay proceedings in this action pending resolution of the current state proceedings or such earlier time as may appear appropriate upon a showing of one or more of the parties.

782 (E.D. Pa. 1999); Allied Nut & Bolt, Inc. v. NSS Indus., Inc.
920 F. Supp. 626, 631 (E.D. Pa. 1996); Southeastern Pa. Transp.
Auth. v. Pennsylvania Pub. Util. Comm'n, 826 F. Supp. 1506, 1514
n.5 (E.D. Pa. 1993).

The first two factors are implicated. The fourth factor favors abstention as plaintiff first filed an action in the state courts.

The import of the third factor turns on whether there is a strongly articulated Congressional policy against piecemeal litigation. See Spring City Corp. v. American Bldgs. Co., 193 F.3d 165, 172 (3d Cir. 1999) (abstention appropriate only when there is a strong federal policy against piecemeal litigation); Ryan, 115 F.3d at 197 (same); Board of Revision of Taxes, 49 F. Supp.2d at 782 (same). No such policy is apparent here.

This action involves federal constitutional issues. See Ryan, 115 F.3d at 197 (presence of federal issues is major consideration weighing against abstention); Kentucky West Va. Gas Co. v. Pennsylvania Public Utility Comm'n, 791 F.2d 1111, 1118 (3d Cir. 1986) (denying Colorado River abstention where federal law governed action); Bell Atlantic-Pa., Inc. v. Pennsylvania Public Utility Comm'n, 107 F. Supp.2d 653, 668 (E.D. Pa. 2000) (presence of federal issues is major consideration weighing against abstention); Board of Revision of Taxes, 49 F. Supp.2d at 782 (presence of federal issues is major consideration).

Finally, it appears that the state proceedings may be inadequate to vindicate plaintiff's rights. Plaintiff states, and defendant does not contest, that compensatory and punitive damages are unavailable in the pending state actions. See Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 26-27 (1983) (that it was doubtful state court could order relief plaintiff sought counseled against Colorado River abstention).

Liability of Individual Defendants

Defendants argue that the challenged actions were taken by the Supervisors as a Board and thus no viable claim lies against the Supervisors individually. They stress that the Supervisors did not have authority to act individually under the Pennsylvania Municipalities Planning Code, 53 P.S. § 10601, when reviewing, approving or disapproving plaintiff's land development plans. Not surprisingly, defendants cite no authority for the rather remarkable proposition that individuals who act in concert to deprive a plaintiff of his constitutional rights are not liable under § 1983 whenever collective action was necessary to effect the deprivation. That individual defendants were acting as members of a board when they interfered with a property right in violation of due process guaranties would not insulate them from liability. See, e.g., Blanche Road Corp. v. Bansalem Tp., 57 f.3d 253, 267-68 (3d Cir. 1995); Bello v. Walker, 840 F.2d 1124, 1129-30 (3d Cir. 1988). Moreover, plaintiff alleges that

acting ultra vires, Supervisors instructed the Township Manager and other personnel to take actions to thwart plaintiff's application.

The individual defendants are entitled to qualified immunity from liability for damages under § 1983 if "reasonable officials in the defendants' position at the relevant time could have believed, in light of what was in the decided case law, that their conduct would be lawful." See *Woodwind Estates, Ltd. v. Gretkowski*, 205 F.3d 118, 125-26 (3d Cir. 2000); *In re City of Philadelphia Litig.*, 49 F.3d 945, 962 n.14 (3d Cir. 1995); *Good v. Dauphin County Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1092 (3d Cir. 1989). Defendants are not entitled to qualified immunity in the face of allegations that they collaborated to prevent plaintiff's proposed use of its property for improper reasons. See *Blanche Road*, 57 F.3d at 269 (no qualified immunity for township supervisors who conspired to block development of plaintiff's property by improperly impeding approval of land development permit applications).

Punitive Damages

Plaintiff cannot recover punitive damages against Upper Providence and the Board. See *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981); *Robey v. Chester County*, 946 F. Supp. 333, 338 (E.D. Pa. 1998). Plaintiff cannot recover punitive damages against the Supervisors in their official capacities.

See Gregory v. Chehi, 843 F.2d 111, 120 (3d Cir. 1988); Marchese v. Umstead, 110 F. Supp.2d 361, 373 (E.D. Pa. 2000). The Supervisors may be liable in their individual capacities for punitive damages as their alleged conduct could be found to involve reckless or callous indifference to plaintiff's federally protected rights. See Smith v. Wade, 461 U.S. 30, 56 (1983); Robey, 946 F. Supp. at 338.

Conclusion

Plaintiff's claims for declaratory and injunctive relief will be dismissed on Younger grounds.⁶ Plaintiff's punitive damages claims against the township, the Board and the Supervisors in their official capacities will be dismissed. Defendants' motion will otherwise be denied. Proceedings on plaintiff's damage claims will be stayed pending resolution of the current state proceedings or such earlier time as may appear appropriate upon a showing by one or more of the parties.

An appropriate order will be entered.

⁶Dismissal is appropriate when Younger abstention is warranted. See O'Neill v. City of Philadelphia, 32 F.3d 785, 793 (3d Cir. 1994); H.C. ex rel. Gordon v. Koppel, 203 F.3d 610, 613 (9th Cir. 2000); Zalman v. Anderson, 802 F.2d 199, 207 n.1 (6th Cir. 1986); DeSpain v. Johnston, 731 F.2d 1171, 1179 (5th Cir. 1984); 17A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4252 (2d ed. 1987).

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O R D E R

AND NOW, this day of September, 2001, upon
consideration of defendants' Motion to Dismiss (Doc. #5) and
plaintiff's response thereto, consistent with the accompanying
memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** in
part in that plaintiff's claims for a declaratory judgment and
injunction and plaintiff's punitive damages claims against the
Township of Upper Providence, the Board of Supervisors and the
Supervisors in their official capacities are **DISMISSED**; and, said
Motion is otherwise **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.