

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

WESTRUM LAND DEVELOPMENT CORP. :
Plaintiff

v.

CIVIL ACTION NO.

WHITPAIN TOWNSHIP, acting by
and through its Board of
Supervisors, LEIGH P. NARDUCCI :
NICHOLAS TETI, BRIAN W. YOUNG, :
JOSEPH J. PALMER, and ANTHONY :
GRECO
Defendant

01-5535

MEMORANDUM AND ORDER

McLaughlin, J.

October 23, 2002

The plaintiff, Westrum Land Development Corporation has filed suit under 42 U.S.C. §1983 against Whitpain Township, alleging that the Township violated Westrum's substantive and procedural due process rights by instituting an eminent domain action against property Westrum intended to develop.

The Court decides here the defendant's motion to dismiss this action. The defendant has requested that the Court abstain from hearing this case or dismiss the case for failure to state a claim upon which relief may be granted. The Court will not abstain but will dismiss the case because the plaintiff has failed to state a claim.

I. BACKGROUND

On May 15, 1998, Westrum Land Development Corporation ('Westrum") entered into an agreement to purchase an 82 acre parcel of land in Whitpain Township' ('Township") from Robert and Lynne Thomson ("the parcel"). Westrum intended to create a residential subdivision on the parcel and, after meeting with the Township's Board of Supervisors ('the Board") in 1998-1999, believed that the Township would accept Westrum's development plan.

The parcel was governed by a 1995 Open Space Plan, adopted by the Whitpain Open Space Planning Committee, which designated 46 acres of the parcel as priority space to be reserved as open space.

On September 21, 1999, Westrum filed a conditional use application for approval of its development plan. The plan showed 54 single-family residential units located on the non-priority space, and one 49 acre lot restricted from further development.

On the day the application was filed, the Township

¹ Whitpain Township is a Township of the Second Class, operating pursuant to the Second Class Township Code of Pennsylvania. 53 P.S. §65101, et. seq..

returned the application to Westrum and announced that it intended to acquire the entire parcel through its eminent domain power. On October 26, 1999, the Township passed Ordinance 260, authorizing the condemnation of the property for "purposes, inter alia, of a public park, recreation area and facilities and open space, as well as for other legitimate Township purposes." Whitpain Township Ordinance 260. On November 5, 1999, a Declaration of Taking was filed in the Court of Common Pleas of Montgomery County. In re Condemnation of Eighty Two Acres, No. 99-19535.

After the filing, the Township filed a Petition for a Board of Compensation ("Board of View"), and on November 24, 1999, Westrum asserted a claim before the Board of View. On November 19, 2001, after four compensation hearings, the Board of View filed a Report and Award, granting Westrum \$1,133,504 and granting the Thompsons more than \$7 million, reduced by a previous payment from the Township. In re Condemnation of Eighty Two Acres, No. 99-19535, Report of the Board of View and Award. On December 2001, the Thomsons, Westrum, and the Township separately appealed the award in the Montgomery County Court of Common Pleas; these appeals are still pending.

Westrum has brought claims under 42 U.S.C. § 1983 for violations of its substantive and procedural due process rights. Westrum alleges that the defendant violated Westrum's substantive due process rights **by** commencing an eminent domain action that was arbitrary, irrational, and not in furtherance of any legitimate government interest. Westrum also contends that the taking violated its procedural due process rights because Westrum was not able to raise its substantive due process rights during the eminent domain proceedings. Westrum seeks damages suffered as a result **of** the condemnation, including lost profits from the development of the property and costs and expenses incurred in the development process.

11. ANALYSIS

A. Abstention

The defendant has requested that the Court abstain from hearing this case under the abstention doctrines **of** Burford v. Sun Oil Company, 319 U.S. 315, 63 S.Ct. 1098 (1943) and Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 96 S.Ct. 1236 (1976). This Court finds that neither a Burford abstention nor a Colorado River abstention is appropriate in this

case.

1. Burford Abstention

"Burford abstention is appropriate where a difficult question of state law is presented which involves important state policies or administrative concerns.'" Heritage Farms, Inc. v. Solebury Township, 671 F.2d 743, 746 (3d Cir. 1982) (citing Burford v. Sun Oil Co., 319 U.S. 315, 332-34 (1943)). In these situations, "a federal court may abstain to avoid disrupting the efforts of a state to establish a coherent policy with respect to a matter of substantial public concern." Id. (citing Colorado River Conservation Dist. v. United States, 424 U.S. 800, 814 (1976)).

Burford abstention has been limited to cases in which the plaintiff is seeking equitable relief. Quackenbush v. AllState, 517 U.S. 706, 727, 116 S.Ct. 1712 (1996). "[A] district court may not abstain under Burford and dismiss the complaint when the remedy sought is legal rather than discretionary." Feige v. Sechrest, 90 F.3d 846, 850 (3d Cir. 1996). The rationale behind this result is that the "power to dismiss under the Burford doctrine, as with other abstention

doctrines, ... derives from the discretion historically enjoyed by courts of equity. Id. (quoting Quackenbush, 517 U.S. at 727-28).

Because the plaintiff is seeking only monetary damages, the Court may not abstain. If the Burford rationale applies, however, a court may stay a case pending resolution of an ongoing state proceeding. Id. at 851. The Court must consider whether to stay the case under Burford principles.

The Township argues that Burford principles apply because the case concerns an ongoing condemnation of property under the eminent domain code, and proceeding with the case would disrupt Pennsylvania's efforts to establish a coherent policy with respect to a matter of substantial policy concern.

Although the Third Circuit has recognized that the application of eminent domain procedures is one of the traditional areas where Burford abstention is proper, it has cautioned that "the mere existence of land use regulation will not automatically mandate federal court abstention." Izzo v. Borough of River Edge, 843 F.2d 765, 769 (3d Cir. 1982). See also Grode v. Mutual Fire Martine and Inland Ins. Co., 8 F.3d 953, 956 (3d Cir. 1993). Rather, when presented with a claim

arising out of land use questions, district courts are instructed to 'examine the facts carefully to determine what the essence of the claim is.'" Heritage Farms, Inc. v. Solebury Township, 671 F.2d 743, 748 (3d Cir. 1982).

Westrum has brought claims under § 1983. The essence of the plaintiff's claim lies in due process - the alleged improper invocation of the eminent domain power by the Township, rather than a taking that offends the just compensation clause. The case that is pending in state court involves the question of the proper value of the property that was taken. The plaintiff does not seek just compensation here; the plaintiff is seeking lost profits from the development of the property, and costs and expenses incurred in the development process².

In Izzo, the Third Circuit outlined several criteria which provide "a useful framework for analysis" to determine whether abstention under Burford is appropriate. 843 F.2d at 769. Those criteria provide that before invoking Burford to

²The characterization of the plaintiff's claim is also dispositive of the defendants' ripeness argument. The defendants have argued that the claim is not ripe because there has not been a final decision on the just compensation issue. But there has been a final decision on the condemnation issue. Because the claim is a section 1983 due process claim, it is ripe.

abstain from hearing a case involving a federal question, the following three conditions should be present: (1) the subject of the regulation be of significant and special concern to the state; (2) the state regulatory scheme be detailed and complex; (3) the federal issue be unresolvable without requiring the district court to immerse itself in the technicalities of the state's scheme. Id. (citing Martin H. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 295 (2d Ed. 1990)). See Cohen v. Township of Cheltenham, Pa., 174 F. Supp. 2d 307, 317 (E.D. Pa. 2001) (applying factors).

The exercise of the eminent domain power is certainly of special concern to the Commonwealth. The Court will also accept that the eminent domain procedure is detailed and complex. The Court, however, would not have to immerse itself in the technicalities of the state scheme **in** order to resolve the federal issues presented in the case. The plaintiff claims a deprivation of its substantive and procedural due process rights - an analysis in which federal courts traditionally engage.

The defendants also argue that abstention is appropriate here because the plaintiff could have brought its

due process arguments in the eminent domain proceeding. The plaintiff argues that it could not have done so because it could not recover the consequential damages it seeks in an eminent domain proceeding, citing Gwynedd Props., Inc. v. Lower Gwynedd Township, 970 F.2d 1195, 1205 (3d Cir. 1992).

The plaintiff appears to be confusing a claim and a remedy. The Eminent Domain Code allows a condemnee, like Westrum, to file preliminary objections within thirty days of the filing of the declaration of taking. 26 P.S. §1-406(a). A condemnee is specifically permitted by statute to include in such objections a challenge to the power or right of the condemnor to appropriate the property. Id. The plaintiff's challenge to the taking - that it was arbitrary, unnecessary, and based on improper motive - could have been raised as a preliminary objection contesting the right of the Township to appropriate the property. See Township of East Hanover v. Chesapeake Estates Partnership, 701 A.2d 313 (Pa. Cmwlth. 1997). In East Hanover, the court considered a preliminary objection made by the condemnee that the taking in question was

purposeless and arbitrary³. Id. at 316.

It is true that the plaintiff could not have recovered consequential damages in the eminent domain proceeding; but had Westrum been successful with its constitutional claims, it would have overturned the condemnation decision and been able to develop its property. Thus, there would have been no consequential damages.

Although the Court agrees with the defendant that the plaintiff could have raised these claims in the eminent domain proceeding, it is not a prerequisite to this case that the plaintiff have done so. Exhaustion of state remedies is not a prerequisite to § 1983 claims brought by non-prisoners. Monroe v. Pape, 365 U.S. 167, 183 (1961); see also Davidson v. O'Lone, 752 F.2d 817, 829 (3d Cir. 1983) (explaining that the courts have "repeatedly declined" to require exhaustion of state judicial or administrative remedies for § 1983 actions).

³Several other Pennsylvania cases have held that an arbitrariness and/or unreasonableness challenge may be raised in state court proceedings as an objection to an eminent domain taking. See, e.g., Simco Stores v. Redevelopment Authority, 317 A.2d 610 (Pa. 1974); In re Condemnation by Penn Twp. 702 A.2d 614 (Pa. Cmwlth. 1997).

2. Colorado River Abstention

Nor is abstention under Colorado River appropriate. In Colorado River, the Supreme Court held that a district court may abstain from hearing a federal action if there is a pending parallel state court proceeding. In order to abstain under Colorado River, the parallel state and federal litigations must be "truly duplicative." Rycoline Prods., Inc. v. C & W Unlimited, 109 F.3d 883, 890 (3d Cir. 1997).

The pivotal question is whether the pending state action and this action are truly duplicative. Generally, cases are parallel if they involve the same parties and claims. Ryan v. Johnson, 115 F.3d 193, 196 (3d Cir. 1997). "When the claims, parties, or requested relief differ, deference may not be appropriate." Trent v. Dial Medical, 33 F.3d 217, 224 (3d Cir. 1994).

The pending state claim is an appeal of the \$1,133,508.92 award granted by the Board of View to Westrum. The due process claims for damages asserted by Westrum in the federal complaint are not pending before the state **court**. The two cases are not truly duplicative and Colorado River abstention is not

appropriate.

B. Failure to State a Claim

1. Substantive Due Process Claims

Westrum alleges that the Township violated Westrum's substantive due process rights by instituting eminent domain proceedings without any rational reason or proper motivation. Westrum argues that the Township's true motive for condemning the property was not **to** preserve open space, as the Township resolution stated, but to prevent any development of the parcel at all. This was unnecessary and irrational, Westrum argues, because the plan Westrum submitted would have preserved the amount **of** space recommended **by** the Township's open space plan.

To properly plead a substantive due process claim, the plaintiff must allege that the decision to proceed with an eminent domain action was 1) not rationally related to a legitimate government interest or 2) was motivated by bias, bad faith, or improper motive. Blanche Road Corp. v. Bensalem Township, 57 F.3d 253, 263 (3d Cir. 1995). Conclusory allegations of arbitrariness or irrationality, without more, are insufficient to state a proper claim in this area. Pace Resources

v. Shrewsbury Township, 80.8F.2d 1023, 1026 (3d Cir. 1987)

The plaintiff has not alleged facts to support its conclusory allegations that the action by the Township was irrational or arbitrary. Land use planning is a legitimate interest of a local township like Whitpain. The Second Class Township Code illustrates this, giving the Township the ability to exercise the right of eminent domain for land use planning purposes. 53 Pa. C.S.A. §67201.

The plaintiff alleges that the Township's attempt at land use planning is not rational because the taking is a pretext for preventing any and all development of the parcel. However, even if Westrum's allegation of pretext is true and the Township intended to prevent **all** development, the Township's action to do so would still fall into the category of legitimate land use planning.

In Pace Resources, the court found that a complaint alleging that a zoning board improperly re-zoned certain land in an effort to curb industrial development was insufficient to state a substantive due process claim. Id. at 1035-36. The Court held that "one can easily articulate a rational connection" between the township's actions and the legitimate land **use** goal

of curbing industrial development. Similarly, in this case, there is a rational connection between preventing any development of the property whatsoever and land use planning. Thus, even if Westrum's allegations of pretext were taken as true, the Township's actions are still rationally related to the legitimate government interest of land use planning.

The plaintiff also claims that the Board of Supervisors acted irrationally and arbitrarily because it condemned the property in order to preserve more open space than the Township's Open Space Plan ("the Plan") allotted. However, mere non-compliance with the plan is insufficient to render the condemnation arbitrary or irrational. Even if the Plan were binding on the Township and were violated, such a violation of state law is "not sufficient in itself to establish a substantive due process claim." Id., See Midnight Sessions, LTD. v. City of Phila., 945 F.2d 667, 684 (3d Cir. 1991) (even if city's delegation of authority to police department for recommendation on licensing question was violation of state law, it is not a substantive due process violation because such delegation was not "arbitrary or irrational").

Nor has the plaintiff alleged that the taking was

"motivated by personal gain, individual discriminatory intent, or partisan political considerations," the other possible basis for a substantive due process claim. Sameric Corp. v. City of Philadelphia, 142 F.3d 582, 594 (3d Cir. 1998). See also Parkway Garage, 5 F.3d 697 (3d Cir. 1993) (evidence that city had economic motive in terminating lease); Thornbury Noble, LTD. v. Thornbury Township, No. Civ. A. 99-6460, 2000 WL 1358483, *2 (E.D. Pa. Sep. 20, 2000) (allegation that development plan rejected because developer failed to make financial contribution to the township). The plaintiff has made no allegations of improper economic, partisan, or personal reasons for the land use action in question such allegations.

2. Procedural Due Process

Westrum argues that its procedural due process rights were violated because it could not have raised the arbitrariness of the state's actions in the condemnation proceeding, and because the state law did not allow for the type of damages Westrum seeks.

The Third Circuit has held that where a state provides a full judicial mechanism to review and challenge administrative

land use decisions, the state provides adequate due process, whether or not the plaintiff avails him or herself of the provided appeal mechanism. See DeBlasio v. Zoning Bd., et.al. , 53 F.3d 592, 597 (3d Cir. 1995). The state procedures for challenging an eminent domain taking were sufficient to protect the plaintiff's rights in this case, even though it did not take advantage of them, because the plaintiff had an opportunity to both raise the constitutional claims and to avoid the damages altogether. See 11. A. 1. above.

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

WESTRUM LAND DEVELOPMENT CORP.

Plaintiff

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CIVIL ACTION NO.

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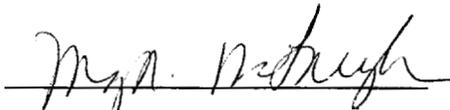
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ORDER

AND NOW, this 23^d day of October, 2002, upon
consideration of defendant, Whitpain Township's, Motion to
Dismiss (Docket #5), the plaintiff's Opposition, defendant's
Reply, Oral Argument on the Motion, Plaintiff's Supplemental
Memorandum in opposition to Defendant's Motion to Dismiss, and
defendant's Response thereto, it is hereby ORDERED and DECREED
that the defendant's Motion to Dismiss is GRANTED.

BY THE COURT:



MARY A. MCLAUGHLIN, J.

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

WESTRUM LAND DEVELOPMENT CORP.

:
:

CIVIL ACTION

v.

WHITPAIN TOWNSHIP, et al.

NO.01-5535

CIVIL JUDGMENT

Before the Honorable Mary A. McLaughlin:

AND NOW, this 23rd day of October, 2002, in accordance with the Court's Order of October 23, 2002,

IT IS ORDERED that Judgment be **and** the same is hereby entered in favor of Defendant's Whitpain Township, et al. and against Plaintiff, Westrum Land Development Corporation.

BY THE COURT

ATTEST:



Carol James
Deputy Clerk