

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

STEPHEN E. ANDERS, et al. : CIVIL ACTION
 :
 v. :
 :
 THE BOROUGH OF NORRISTOWN : NO. 97-CV-2026

MEMORANDUM AND ORDER

J. M. KELLY, J.

October , 1997

This is a challenge to a Norristown Ordinance that requires owners of residential rental property to pay an annual license fee. The Plaintiffs, a group of Norristown residential landlords, claim that the Ordinance violates the Equal Protection Clause of the 14th Amendment. The Borough asserts that pursuant to the Tax Injunction Act of 1937, 28 U.S.C. § 1341, this Court does not have subject matter jurisdiction. Alternatively, the Borough contends that the Ordinance is rationally related to a legitimate governmental purpose.

Presently before the Court are cross motions for Summary Judgment.¹ The Court has considered each party's responses and oral argument was held in this matter on September 30, 1997.

¹ Defendant's motion is styled: "Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment and Response in Opposition to Plaintiff's Motion for Summary Judgment." As Defendant has filed exhibits and deposition transcripts in support of their motion, the Court shall treat it as a motion for summary judgment.

BACKGROUND

Beginning in approximately 1980, a large number of residential properties in Norristown were converted from owner occupied units to rental units. Surmising that landlords have less incentive to maintain their property than owner-occupants, and that residential tenants operate with insufficient bargaining power, the Borough decided that enforcement of housing codes was important to the health and safety of Norristown's residents. In 1981, the Borough began to charge owners of residential rental properties a "license fee" to offset the costs of code enforcement.

In 1994, the Borough increased the license fee from \$65 per unit to \$130 per unit. According to the Borough, the additional \$65 was needed to offset increased Police and Fire protection costs that it attributed to residential tenants. A group that includes many of the landlords in this suit challenged the 1994 Ordinance in the Montgomery County Court of Common Pleas. On plaintiff's motion for partial summary judgment, the state court declared the Ordinance an illegal "revenue producing measure." Asko v. Borough of Norristown, No. 94-23370 (Ct. Common Pleas Nov. 8, 1995)(granting plaintiff's motion for partial summary judgment). The court held that while the Borough could charge residential landlords a fee that is "reasonably commensurate" with regulatory expenses, it could not use the license fee as a means of generating revenue. Id.

In 1996, shortly after the state court decision, the Borough

enacted the Ordinance at issue here, which requires an annual fee of \$65 per rental unit. The Ordinance states that the fee is:

"to offset costs incurred by the Borough for inspections by Borough personnel pursuant to Borough Housing Code, the Borough Plumbing Code, the Borough Electric Code, the Borough Fire Code and any other inspection required by state statutes and Borough ordinances and regulations relating to the health, safety and welfare of the citizens of the Borough of Norristown."

While it appears that the state court litigation is ongoing, Plaintiffs decided to challenge the constitutionality of the 1996 Ordinance in federal court.

DISCUSSION

The Plaintiffs' claim is that they are being singled out to pay a "tax," disguised as a license fee, in violation of the Equal Protection Clause. The Plaintiffs contend that there is no rational basis for treating them differently than commercial landlords or owner-occupants. Further, they allege that the Borough collects substantially more revenue through its license fee than is required to cover the costs of regulating Norristown's structures.

If Norristown's license fee is rationally related to the goal of ensuring compliance with minimum housing standards, it is a legitimate exercise of the Borough's police power and it is valid under the Equal Protection Clause. If, however, the Plaintiffs are correct that Norristown's license fee is actually a tax, the Tax Injunction Act requires dismissal for lack of

subject matter jurisdiction. Therefore, there is no set of facts by which the Plaintiffs could prove their case in this Court.

I. Legal Standard For Summary Judgment Under Federal Rule of Civil Procedure 56

Under Fed. R. Civ. P. 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This court is required, in resolving a motion for summary judgment pursuant to Rule 56, to determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmovant's favor. See id. at 255. Furthermore, while the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

II. Equal Protection

The Equal Protection Clause "directs that 'all persons similarly circumstanced shall be treated alike.'" Alexander v. Whitman, 1997 U.S. App. LEXIS 12509, *39 (3d Cir. May 23, 1997)(quoting, New York Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979)). Legislative classifications are not prohibited, they simply must bear some relationship to the legitimate goals of the legislature. San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 40 (1972). The parties agree that the Ordinance challenged here is not based on a suspect classification and does not burden a fundamental right. Thus, the Plaintiffs have the burden of proving that the classification and disparate treatment of residential landlords is not rationally related to a legitimate governmental purpose. McGowan v. Maryland, 366 U.S. 420, 426 (1961).

Residential rental properties require greater governmental health and safety regulation than other types of property. Bloomsburg Landlords Assoc. v. Town of Bloomsburg, 912 F. Supp. 790 (M.D. Pa. 1995); McSwain v. Commonwealth, 520 A.2d 527, 530-31 (Pa. Commw. Ct. 1987); Geenacres Apartments, Inc. v. Bristol Township, 482 A.2d 1356, 1359 (Pa. Commw. Ct. 1984); Dome Realty, Inc. v. City of Paterson, 416 A.2d 334, 351-52 (N.J. 1980). Thus, there is a rational basis for requiring residential landlords to pay the costs of regulation. Id.; McSwain, at 531;

Greenacres at 1359. If the license fee at issue here is roughly proportional to the Borough's regulatory costs, it is valid.

If a "license fee" is grossly disproportionate to regulatory costs, the fee may be considered an unlawful "tax." Martin Media v. Hempfield Tp. Zon., 671 A.2d 1211, 1215 (Pa. Commw. 1996); Asko v. Borough of Norristown, No. 94-23370 (Ct. Common Pleas Nov. 8, 1995). Pursuant to the Tax Injunction Act, however, this Court does not have power to invalidate a state tax when the state's courts provide an adequate remedy.

III. The Tax Injunction Act

The Tax Injunction Act ("the Act") provides:

The district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341.

The purpose of the Act is to preclude unnecessary judicial interference in state revenue raising operations. Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503, 522 (1981); Robinson Protective Alarm Co. v. City of Philadelphia, 581 F.2d 371, 374-76 (3d Cir. 1978). The statute has its roots in principles of equity, federalism and comity. Tully v. Griffin, Inc., 429 U.S. 68, 71. The Act applies to suits for injunctive or declaratory relief. See California v. Grace Brethren Church, 457 U.S. 393, 408 (1982); Robinson, 581 F.2d at 373 n.5. A court evaluating its jurisdiction under the Act must consider: (1) whether the suit

seeks invalidation of a "tax under state law"; and (2) whether the courts of the state offer a "plain, speedy and efficient remedy."²

Whether a particular fee is a "tax under state law" is determined by reference to the policies underlying the challenged statute. Robinson, 581 F.2d at 374. Assessments imposed primarily to raise revenue are "taxes," while assessments imposed for regulatory or punitive purposes are not "taxes." Id.; Butler v. State of Maine Supreme Judicial Court, 767 F. Supp. 17, 19 (D. Me. 1991) (collecting cases).³ Therefore, if Norristown's "license fee" was enacted to raise revenue, it is a "tax under

² In response to the assertion that the Tax Injunction Act removes this Court's jurisdiction, Plaintiffs argue that other federal district courts have decided the constitutionality of similar license fees. The only relevant authority cited by the Plaintiffs is Bloomsburg Landlords Assoc. v. Town of Bloomsburg, 912 F. Supp. 790 (M.D. Pa. 1995), where the court held that a license fee was rationally related to the legitimate interest of regulating the safety of rental properties. The court did not consider the Tax Injunction Act in its opinion. Further, Plaintiffs ignore a large number of decisions that have held that the Tax Injunction Act prohibits federal courts from deciding the validity of state fees. See, e.g., Behe v. Chester Cty. Bd. Of Assessment, 952 F.2d 66 (3d Cir. 1991); In re Gillis, 836 F.2d 1001 (6th Cir. 1988); Robinson, 581 F.2d 371; The Independent Coin Payphone Assoc., Inc. v. City of Chicago, 863 F. Supp. 744 (N.D. Ill. 1994); Indiana Waste Sys., Inc. v. County of Porter, 787 F. Supp. 859 (N.D. Ind. 1992); Butler, 767 F. Supp. 17.

³ The Third Circuit has directed that "the meaning of the term 'tax under state law' should be determined as a matter of federal law by reference to congressional policies underlying the Tax Injunction Act." Robinson, 581 F.2d at 374. Nevertheless, Pennsylvania courts agree that a fee imposed to defray the costs of regulation is a "license fee" while a fee imposed to raise revenue is a "tax." Greenacres, 482 A.2d at 1359 (citing Philadelphia Tax Review Board v. Smith, Kline & French Labs., 262 A.2d 135 (Pa. 1970)); see also E. McQuillan, The Law of Municipal Corporations, § 26.16 (3d ed. 1978).

state law."

If Norristown's license fee is a "tax," Pennsylvania's courts provide "a plain, speedy and efficient remedy." Pennsylvania provides "a full hearing and judicial determination at which [a taxpayer] may raise any and all constitutional objections to the tax." Rosewell, 450 U.S. at 514. The Plaintiffs may raise their equal protection claim in state court. See Behe, 952 F.2d at 69-70 (finding that Pennsylvania's courts provide a "plain, speedy and efficient" remedy for taxpayer alleging that tax scheme violates equal protection). The Plaintiffs have not presented any evidence to suggest that the remedy available in Pennsylvania's courts is inadequate. In fact, the Plaintiffs have already succeeded in having a 1994 "license fee" Ordinance invalidated. Asko v. Borough of Norristown, No. 94-23370 (Ct. Common Pleas Nov. 8, 1995).

CONCLUSION

If the purpose of Norristown's license fee is to offset the regulatory costs attributable to the business conducted by residential landlords, then it is a valid exercise of the Borough's police power. If, conversely, the Plaintiffs are correct that the Borough collects far more than it spends on regulation, and that the "license fee" is thus a hidden tax, the remedy would be invalidation of that "tax." Federal district courts do not have jurisdiction to invalidate a state tax scheme where a plain, speedy and efficient remedy is available in state

court. Therefore, there is no set of facts by which the Plaintiffs could prove their case in this Court and the Defendant is entitled to summary judgment.

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THE BOROUGH OF NORRISTOWN : NO. 97-CV-2026

ORDER

AND NOW, this day of October 1997, upon consideration of the Cross-motions for Summary Judgment filed by Plaintiffs Stephen E. Anders, et. al. and Defendant Borough of Norristown, the responses filed by the parties, and the oral argument held on September 30, 1997, it is ordered:

1. The Motion for Summary Judgment filed by Plaintiffs Stephen E. Anders, et al., is DENIED.

2. The Motion for Summary Judgment filed by Defendant Borough of Norristown is GRANTED. Judgment is ENTERED in favor of Defendant Borough of Norristown and against Plaintiffs Stephens E. Anders, Anna H. Armstrong, Robert E. Armstrong Anthony Baker, Annetta Baker, Joseph Baker, Mary Baker, Ronald Baker, Susan Baker, George Baxavaneos, George K. Bernstiel, III, Charles Bono, George J. Boyd, Robert Brandt, Jr., Richard O. Burk, Barbara Cantello, Paul Cantello, C. J. Capinski, Anthony Caramenico, David Caramenico, Deborah Caramenico, Kathleen Caramenico, Michael Caramenico, Stephen Caramenico, Edward Cartlidge, Anthony J. Catagnus, Jr., Central States Management Co., Julio Ciabatttoni, Sr., A. J. Cianciulli, Irene Cianciulli,

Louis A. Collins, Jr., Colonial Pine Apartments, Salvator J. Cotteta, Curren Partnership, Richard Dean, Susan Dean, Craig DeBernardo, Sharron DeBernardo, Michael A. DiGiacomo, Charles Dicter, Richard Dicter, Brian Engle, George Fitzgerald, William Fleming, Frankford Bank, David A. Geppert, Donna Geppert, Alfredo Giammateo, Frank Giammatteo, Peter Giammatteo, John L. Giegerich, Jr., Grimm Brothers Realty, Inc., Alice Grimm, Gary Grimm, Gregory Grimm, Kevin Grimm, Marie Grimm, Richard V. Grimm, R.V. Grimm Rentals, Inc., Barry Henry, Thomas Hobson, Jr., John Hockenbrock, Robert A. Jackson, Jar Jr Co., Inc., K&D General Contractors, Inc., Michael Karp, Robert L. Kenney, Patricia A. Kenney, Horst Korier, Korman Communities, Joel Kotler, Norman Kotzker, Ash Kuber, Laura Lane Apartments, Stephen D. Lawrence, William Lawson, Carol Lawson, Kenneth Long, Joseph C. Martin, Sandra L. Martin, Steven M. Martin, Theresa M. Martin, Fred T. Marzano, Linda McLaughlin, Luke F. McLaughlin, Charles Moles, Charles Moles Associates, Charles Moles Real Estates, Inc., Donna Moles, Marie Monastero, Norris Hills Apartments, Inc., Norris Woods Associates, NPI Management Corporation, Catherine Palumbo, Peter Patel, Roger Patel, Joanne S. Patti, Joseph V. Patti, P.D. Perry, Louis Piantone, Louis J. Piantone, Jr., Paul C. Piantone, Pauline Piantone, James T. Picard, Jr., Susan R. Picard, PMA Rentals, R. G. Powell, Professional Property Brokers Associates, Cnythia L. Raieta, Joseph A. Raieta, Barry Reinhart, Lizanne Reinhart, David Rice, Barbara Ronca, Anthony Rossi, Estate of James Scarfone, David M. Sereny, Maureen Sereny, Micharl Sereny,

Ronald Sereny, John Sheward, Marjorie Sheward, Carl Smith,
Charles Smith, Jr., Elaine Smith, Christine Stayton, Estate of
George Stayton, Sr., George Stayton, Richard A. Sterley, Michael
Stevens, Peter J. Stipa, Karen K. Verma, Ferrol Walker, Tonya J.
Walker, and Alfred Yzzi.

BY THE COURT:

JAMES MCGIRR KELLY, J.