

Court Allows Some Causes of Action under 42 USC 1983 to Stand Against the Village of Suffern

The Appellate Division Second Department decided a complex appeal involving cross motions on whether a property owner had sufficiently stated causes of action sounding in violations of constitutional rights under 42 USC 1983 and related causes of action resulting from the denial of a certificate of use. In the case of *Sonne v. Board of Trustees of the Village of Suffern*, the court dismissed some but let stand several causes of action resulting from a long standing dispute over whether a property owner could use and occupy the third floor of a 100 year old commercial building.

The case has a complex history. The Village had denied the property owner the right to use the third floor of its commercial building because there is only one useable exit from the third floor and the Village claims this violates the State of New York Uniform Fire Prevention and Building Code Act. Underlying the dispute are several factors. The second means of egress from the third floor is blocked by a fence constructed on the adjoining property owned by a company which is controlled by the sons of the former Village Building Inspector, one of whom had also been a Village official, including Mayor from 2001 to 2003. The Village had indicated it would not intervene as this is a private matter between property owners. However, the fence is apparently in violation of the local code but no action was taken to cause it to be removed. Second, the Village has taken the position that the single exit does not comply with the State Uniform Fire Prevention and Building Code Act. Yet, there is an advisory opinion from the State indicating that where a property pre-exists the code, which is the case here, and there has been no substantial additional construction, none of which was proposed here, the current requirement of two exits is not applicable. Complicating the situation more is the fact that the use at issue is non-conforming and the third floor has been vacant for several years. The Village code provides that where a non-conforming use has ceased for more than 6 months it may not be re-established.

In an effort to resolve the issues an agreement was negotiated with the adjoining property owner to put a “panic bar” in the fence, which would have permitted egress from the second exit in an emergency. In addition, as the fence was eight feet high and not in compliance with the local code a variance was obtained for the fence. However, the variance was issued for only two years. As a result the owner complained to Village officials that the two year variance was “useless.” Clearly the concern was that the variance for only two years limited the ability to rent the third floor space. Ten days later the property owner was issued several violations by the Village. During the litigation the Village claimed that this was coincidence and the violations issued were part of a “sweep” of the Village to clean up the downtown of the Village, based upon the Mayor telling the Code Enforcement Officer that there were “a lot of places downtown he’d like to see me pay a visit”. However, the court notes that there was only one other property issued a violation on that date and it appears the violation was based upon a review of the Village files not a “sweep.”

The Plaintiff commenced this action alleging various causes of action, there was discovery and then the Plaintiff moved for summary judgment and Defendants cross moved seeking either dismissal or summary judgment in their favor. The lower court denied both motions and the Appellate Division modified dismissing some causes of action and allowing others to stand.

The Appellate Division opinion first notes the different criteria in deciding a motion to dismiss under CPLR 3211 and a motion for summary judgment under CPLR 3212.

Noting the very limited scope of review on a motion to dismiss the court stated:

“A motion to dismiss a cause of action pursuant to CPLR 3211(a)(7) should not be granted [*4] if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law” (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38; *see AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582, 591; *Leon v Martinez*, 84 NY2d 83, 87-88). In making such a determination, evidentiary material may be considered to “remedy defects in the complaint” (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636; *Leon v Martinez*, 84 NY2d at 88), “and, unless it can be shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it,” dismissal may not be predicated on such evidentiary material (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275; *511 W. 223rd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151).”

The Court then reviewed the basic criteria in determining whether to grant summary judgment stating:

“When considering a motion for summary judgment, the initial test is whether the movant established prima facie entitlement to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). “Once this showing has been made . . . the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*id.*; *see Zuckerman v City of New York*, 49 NY2d 557, 562).”

Examining the claim for a violation of substantive due process the court addressed the application of 42 USC 1983 in the context of land use disputes:

““In the land use context, 42 USC § 1983 protects against municipal actions that violate a property owner's rights to due process, equal protection of the laws and just compensation for the taking of property under the Fifth and Fourteenth Amendments to the United States Constitution” (*Bower Assoc. v Town of Pleasant Val.*, 2 NY3d 617, 626; *Town of Orangetown v Magee*, 88 NY2d 41, 49). However, “42 USC § 1983 is not simply an additional vehicle for judicial review of land-use determinations” (*Bower Assoc. V Town of Pleasant Val.*, 304 AD2d 259, 263). In order to establish a deprivation of a property right in violation of substantive due process, the

claimant must establish (1) a cognizable or vested property interest, not the mere hope of one, and (2) that the municipality acted "without legal justification and motivated entirely by political concerns" (*Bower Assoc. v Town of Pleasant Val.*, 2 NY3d at 627, quoting *Town of Orangetown v Magee*, 88 NY2d at 53). "As for the second element of the test, only the most egregious official conduct can be said to be arbitrary in the constitutional sense" (*Bower Assoc. v Town of Pleasant Val.*, 2 NY3d at 628, quoting *City of Cuyahoga Falls v Buckeye Community Hope Found.*, 538 US 188, 198; *St. Joseph Hosp. of Cheektowaga v Novello*, 43 AD3d 139, 144)."

Finding that the Village Officials had relied on an incorrect interpretation of the applicable codes the court nevertheless dismissed the cause of action for violation of substantive due process in failing to issue a certificate of use because: "despite these infirmities, the defendants' conduct in denying the plaintiffs' applications for certificates of use based upon an apparent misinterpretation of Village code provisions did not constitute egregious official conduct. Accordingly, the plaintiff does not state a cause of action sounding in the deprivation of property rights in violation of 42 USC § 1983 as alleged in her first cause of action, and that cause of action should have been dismissed pursuant to CPLR 3211(a)(7)."

The Plaintiff also sought a declaratory judgment that the provisions of the Fire Code do not apply because the structure was built prior to enactment of the Fire Code and no major renovations are planned. The Village contends that the Plaintiff failed to exhaust her administrative remedies by failing to seek a variance from the code provisions. The court noted however that the exhaustion of administrative remedies doctrine is not inflexible and in this case the State advised that no variance was necessary. The court went on to find: "the defendants took the position that the plaintiff should have challenged each of its determinations in proceedings pursuant to CPLR article 78. However, at issue was the Village's classification of the subject property as subject to the current provisions of Fire Code, depriving the plaintiff of the use of her property in alleged violation of vested property rights, not the denial of a particular application for a certificate of use. Thus, a cause of action for a declaratory judgment, not a proceeding pursuant to CPLR article 78, was the proper vehicle to seek relief (*see Matter of Huntington Hills Assoc. v Town of Huntington*, 49 AD3d 647). The plaintiff's sixth cause of action states a cause of action for declaratory relief in her favor, and the defendants failed to establish as a matter of law that she is not entitled to such relief."

The court next examined the claim of violation of equal protection of the laws based upon the alleged selective enforcement of the Village Code against Plaintiff. In holding that Plaintiff had adequately pleaded her claim the court held:

“"[A] violation of equal protection arises where *first*, a person (compared with others similarly situated) is selectively treated and *second*, such treatment is based on impermissible considerations . . . intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person" (*Bower Assoc. v Town of Pleasant Val.*, 2 NY3d at 631; *see Matter of 303 W. 42nd St. Corp. v Klein*, 46 NY2d 686, 693). In determining whether persons are

similarly situated, "the test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent. Exact correlation is neither likely nor necessary" (*Penlyn Dev. Corp. V Incorporated Vil. Of Lloyd Harbor*, 51 F Supp 2d 255, 264).

The person must be singled out for an impermissible motive not related to legitimate governmental objectives (*see Bizzarro v Miranda*, 394 F3d 82, 87; *Gallo v Suffolk County Police Dept.*, 360 F Supp 2d 502, 511), which could include personal or political gain, or retaliation for the exercise of constitutional rights (*see Bower Assoc. v Town of Pleasant Val.*, 2 NY3d at 631; *Matter of 303 W. 42nd St. Corp. v Klein*, 46 NY2d at 693). In the instant case, the plaintiff is asserting that her building was singled out from other downtown buildings similarly situated because she exercised her rights to free speech under the First Amendment to the United States Constitution when she complained about the treatment of her application for a variance for the fence. In so doing, she adequately pleaded her causes of action. “

The court did dismiss her claim of violation of the right of free speech finding it duplicative of the claim for violation of equal protection finding: “the plaintiff does not allege how the defendants' actions actually chilled her exercise of her First Amendment Rights (*id*). However, she does allege that the defendants retaliated against her exercise of her First Amendment Rights. She contends that the defendants' retaliation resulted in selective enforcement of code provisions, constituting punishment for the exercise of the constitutional right to free speech, in violation of her right to equal protection of the laws.”

On the issue of failure to file a notice of claim the court held: “[a] cause of action asserted pursuant to 42 USC § 1983 does not require service of a notice of claim (*see Rapoli v Village of Red Hook*, 41 AD3d 456). However, the plaintiff's fifth cause of action sounding in the common-law tort of wrongful interference with prospective economic advantage required the service of a notice of claim as a condition precedent for maintaining it (*see Montano v City of Watervliet*, 47 AD3d 1106; *Clemens v MTA N.Y. City Tr. Auth.*, 19 AD3d 636). Since the plaintiff failed to allege service of a notice of claim, the fifth cause of action should have been dismissed for failure to state a cause of action

Finally there was a defense of qualified immunity raised on behalf of the individual defendants and the court ruled:

“Conlee was an employee of the Town of Ramapo performing duties for the Village pursuant to a contract between the Town of Ramapo and the Village. He established as a matter of law that, although he may have mistakenly violated the plaintiff's rights under the Village of Suffern Code in a good faith attempt to enforce Village policy, he did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The plaintiff, in opposition, failed to raise a triable issue of fact. However, the remaining defendants failed to establish their entitlement to judgment as a matter of law on this issue. ”

Unless it is settled we will no doubt see this case again.