

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

WILMINGTON HOSPITALITY, LLC,)
a Delaware limited liability company,)
)
Plaintiff,)
)
v.) C. A. No. 03C-07-213 MMJ
)
NEW CASTLE COUNTY, a political)
subdivision of the State of Delaware,)
)
Defendant.)

Submitted: April 13, 2007
Decided: April 26, 2007

*Upon Defendant New Castle County's Motion for Summary Judgment
and
Motions to Exclude Expert Testimony*

MEMORANDUM OPINION

Adam Balick, Esquire, Joann Ceballos, Esquire, Balick & Balick, Wilmington, Delaware; John J. Yannacone, Yannacone & Associates, Media, Pennsylvania, Attorneys for Plaintiff

Peter J. Walsh, Jr., Esquire, Sarah E. DiLuzio, Esquire, Potter Anderson & Corroon LLP, Wilmington, Delaware; Hamilton P. Fox, III, Esquire, Gail Westover, Esquire, Jay M. McDannell, Esquire, Sutherland Asbill & Brennan LLP, Washington, DC, Attorneys for Defendant.

PROCEDURAL CONTEXT

Wilmington Hospitality, LLC (“WH”) filed this action on July 28, 2003 against New Castle County (“NCC”). The Complaint contained four counts demanding damages and declaratory relief: (1) pursuant to 42 U.S.C. § 1983 based upon deprivation of due process rights; (2) pursuant to 42 U.S.C. § 1983 for deprivation of property without equal protection; (3) inverse condemnation; and (4) breach of contractual obligation to issue a temporary certificate of occupancy. NCC moved to dismiss the Complaint pursuant to Superior Court Civil Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

By Memorandum Opinion dated August 4, 2004, the Court dismissed: WH’s cause of action under 42 U.S.C. § 1983 based upon deprivation of due process rights; and WH’s claim regarding inverse condemnation. The claims remaining in this action are: pursuant to 42 U.S.C. § 1983 for deprivation of property without equal protection; and for breach of contract. The Court granted the parties the opportunity to conduct additional discovery. The discovery was limited to: the identity of similarly situated land owners, and to their dealings with NCC and the NCC Board of Adjustment (“Board”) in the context of seeking area variances for property constructed not in accordance with the terms of an approved

record plan; and the events that occurred during the September 25, 2001 meeting among NCC, WH, counsel for WH, and a prospective purchaser for the hotel.

NCC filed a Motion for Summary Judgment, a Motion to Exclude the Expert Testimony of William Santora, and a Motion to Exclude the Expert Testimony fo Erich Baum. WH opposes all three motions. Following briefing, the Court heard oral argument on April 13, 2007. This case is scheduled for trial beginning June 4, 2007.

This is the Court's opinion on all three motions.

SUMMARY OF THE FACTS

For purposes of evaluating Defendant's Motion for Summary Judgment, the following facts are undisputed. WH is the former owner of a hotel located alongside Airport Road and I-95 in New Castle County. The principals of WH are Joseph L. Capano ("Capano") and Albert Vietri ("Vietri"). WH's predecessor submitted a Preliminary Plan to NCC for construction of a 118,805 square feet hotel. NCC approved the final Record Plan on April 11, 1990. The original architectural firm designed a 156,000 square feet hotel - 38,000 square feet larger than the authorized Record Plan. Construction then was delayed for almost 8 years.

Following a dispute with the original firm, a second architectural firm was hired. The second firm completed the necessary drawings and filed an application for a building permit on June 5, 1998. NCC reviewed the application and issued a building permit on July 21, 1998 for a 155,480 square feet hotel.

WH invested approximately \$25,000,000 to construct the hotel. On May 12, 2000, WH requested an inspection for a certificate of occupancy. NCC Department of Land Use employees visited the site. NCC found that the hotel did not conform to the Record Plan because construction exceeded the Plan by 38,000 square feet. NCC denied the request for a certificate of occupancy.

WH then applied to the NCC Board of Adjustment (“Board”) for nine zoning variances that would allow the hotel to open, including: (1) increasing the maximum floor area ratio to allow use of the building as constructed; (2) allowing encroachment onto the flood plain of approximately 4,000 square feet; and (3) reducing the number of required parking spaces from 325 to 202.

The Board conducted hearings on the requested variances on July 13 and 26, 2000. The Board reviewed documents and heard testimony from representatives of WH, the architects, and the project engineer. On July 27, 2000, the Board denied the variance requests. WH appealed the Board’s decision to this Court.

On August 22, 2000, WH asked for permission to open part of the hotel consisting of 102,120 square feet. NCC responded that it would issue a certificate of occupancy if WH removed the top two floors or otherwise rendered unusable the space in excess of the Record Plan. NCC further advised WH that it would permit partial opening of the hotel, without the necessity of removing or disabling the top two floors, provided that Capano and Vietri and their relatives did not have any interest in the hotel for a period of 20 years. WH has alleged that the conditions proposed by NCC “would clearly destroy the value of the project and be so expensive and take so long to accomplish that WH would be forced out of business and destroyed.”¹ On October 14, 2000, NCC denied WH’s renewed request for a certificate of occupancy.

On October 20, 2000, WH filed a complaint in the Court of Chancery, seeking to compel NCC to issue a certificate of occupancy. The presiding Vice Chancellor was appointed acting Superior Court Judge to hear appeals from the Board of License, Inspection and Review and from the Board of Adjustment. The Court of Chancery denied WH’s motions for a temporary restraining order and for a preliminary injunction. Trial was set for November 28, 2000. The day before

¹Complaint ¶ 41.

trial, WH notified the Court of Chancery that it was not ready to proceed. Trial was postponed indefinitely and that case remains pending.

WH's lender instituted foreclosure proceedings in this Court on December 26, 2000. WH filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code on June 29, 2001. All Delaware state court matters were automatically stayed.

On September 25, 2001, a meeting was held among NCC, WH, counsel for WH, and a prospective purchaser of the hotel. The parties vehemently disagree as to what transpired during the meeting. WH contends that NCC agreed to issue a temporary certificate of occupancy if WH complied with the terms of a letter from NCC dated February 2, 2001. By letter dated November 1, 2001, WH's attorney referred to the February 2, 2001 letter as a "commitment." By letter dated November 2, 2001, NCC took the position that the February 2nd letter contained a useful listing of outstanding building code issues, but that NCC would not issue a certificate of occupancy until the construction was in full compliance with all applicable laws.

On November 2, 2001, WH executed a contract to sell the hotel to a company whose principals were not related to or affiliated with WH or its

principals. The agreement of sale was approved by the bankruptcy court. WH was required to obtain a certificate of occupancy in order to close the transaction.

WH claims that NCC's refusal to issue a certificate of occupancy, as agreed during the September 25, 2001 meeting, "was done with the intent to undermine and interfere with WH's bankruptcy."² WH also entered into a settlement agreement with its lender. The agreement would have permitted WH to satisfy its outstanding obligations to the lender at a discount of approximately \$1,500,000. Thus, WH asserts that NCC's breach of the agreement reached during the meeting was a "malicious" attempt to prevent WH from selling the property and thereby recouping some of its financial losses.³

On November 30, 2001, WH brought another action in the United States District Court for the Eastern District of Pennsylvania, alleging that the November 2, 2001 letter from NCC breached the agreement to issue a temporary certificate of occupancy. The District Court referred the question of application of the bankruptcy abstention doctrine. The United States Bankruptcy Court for the Eastern District of Pennsylvania recommended abstention. The District Court then granted NCC's motion to dismiss the District Court action.

²Complaint ¶ 48.

³Complaint ¶ 53.

SUMMARY JUDGMENT STANDARD

This Court will grant summary judgment only when no material issues of fact exist. The moving party bears the burden of establishing the non-existence of material issues of fact.⁴ Once the moving party meets its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact.⁵

Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, then the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.⁶ If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of the case, summary judgment must be granted.⁷ A court deciding a summary judgment motion must identify disputed factual issues whose resolution is necessary to decide the case, but the court must not decide those issues.⁸ The Court must evaluate the facts in the light most favorable to the non-

⁴ *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

⁵ *Id.* at 681.

⁶ Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

⁷ *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. denied*, 504 U.S. 912 (1992); *Celotex Corp. v. Catrett*, *supra*.

⁸ *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992).

moving party.⁹ Summary judgment will not be granted under circumstances where the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.¹⁰

ANALYSIS

Section 1983 Equal Protection

WH's claims pursuant to 42 U.S.C. § 1983, for deprivation of property without equal protection, rely on the factual allegation that WH has been treated differently by NCC than others similarly situated. NCC disputes the similarity and differential treatment, and affirmatively argues that NCC had a rational basis for its actions.

WH is neither a member of a protected class under equal protection jurisprudence, nor do its claims implicate any fundamental right. NCC's treatment of Plaintiff, therefore, is not subject to strict scrutiny.¹¹ The United States Supreme Court has authorized "class of one" equal protection claims where the party can show that it has been "intentionally treated differently from others

⁹ *Id.*

¹⁰ *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

¹¹ *See Williamson v. New Castle County*, 2003 WL 549082, at *3 (Del. Ch.).

similarly situated and that there is not rational basis for the difference in treatment.”¹² WH must: (1) identify others who are “similarly situated”; (2) show that these similarly situated entities were treated differently than WH; (3) show that the differential treatment was intentional, in the sense of deliberately singling out WH or being motivated by animus; and (4) demonstrate that there is no rational basis for any differential treatment.¹³

The parties have agreed that the concise question raised in this summary judgment motion is whether any reasonable finder of fact could find that the entities identified by WH are “similarly situated.”

Entities Identified by Plaintiff as “Similarly Situated”

WH has identified the following landowners as similarly situated. For each entity, WH has alleged the following differential treatment.

1. Krishnas, LLC Hotel Project

Krishnas, LLC (“Krishnas”) was in the process of constructing a hotel when NCC learned of a 3,000 square foot discrepancy between the record plan and the constructions plans. An attorney for a contractor on the project submitted a detailed analysis demonstrating that even allowing for Krishnas 31,413 square feet

¹²*Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (U.S. 2000).

¹³*Id.*; *Hill v. Borough of Kutztown*, 455 F.3d 255, 239 (3d Cir. 2006).

calculation (3,000 beyond what the record plan allowed), the plans which were being processed by Krishnas would improperly allow the construction of 41,603 square feet. Thus, the difference between what was allowed by Code and what Krishnas was construction was approximately 43%. No investigation was commenced by NCC to determine if Krishnas was intentionally overbuilding, no demands were made to dismantle the foundation of the hotel, and no demand was made to bar the owners of the property from having any interest in the property. Instead, Krishnas received a variance to allow it to complete its construction of the hotel. The Krishnas decision was rendered on June 28, 2000, the same summer that WH's variance application was denied.

2. Parkside V, LLC

On May 27, 2003, the Delaware Racing Association, the predecessor in interest to Parkside V, LLC ("Parkside"), purchased the property at issue in this lawsuit. The contract contained the following clause:

The foregoing right to assign notwithstanding, this contract may NOT be assigned to, nor shall Seller be required to convey title to, Joseph Capano, Sr. ("Capano"), Albert Vietri ("Vietri"), or any of their spouses, natural or adopted children, natural or adopted offspring of their children, siblings, nephews, nieces or any "affiliate" ...It is the purpose and intent of this provision to assure that Messrs. Capano and Vietri shall not through their immediate families or by any other direct or indirect means have any participation in the operation, management or ownership of the Property and that they shall obtain

no financial or economic benefit from the revenues generated from the Property.

Parkside requested variances which mirrored those that had been sought by WH. Parkside offered a deed restriction barring Capano and Vietri and their relatives from owning the property for a period of twenty years from the date of the Board's variance decision. NCC issued a report recommending that Parkside's variance request be granted. NCC noted that there would be a restriction on the future transfer of the property to Capano, Vietri or any of their family members for a period of twenty years and, on this basis, NCC was willing to recommend that Parkside's variances be granted. NCC further found that "clearly, without plan approval, there can be no beneficial use of the Property...applicant has been denied substantially all economically viable use of the Property." NCC granted all of Parkside's variance requests. NCC did not demand the removal of any excess square footage.

3. Concord Pets Food & Supplies, Inc.

In Concord Pets Food, the applicant sought, among other things, a variance from the maximum building square footage of 3,445 square feet to maintain 11,020 square feet of gross floor area at its commercial property. NCC approved this variance representing a differential of approximately 31% of the total square

footage. NCC did not demand demolition or foaming the excess square footage or barring the property owners from future ownership. The Concord Pet Food & Supplies, Inc. property was built 220% beyond that permitted by Code.

4. Montelone

In Montelone, the original record plan called for 2,500 square feet of office space. However, the structure, as built, was 4,832 square feet, 93% beyond that permitted by the record plan. NCC granted the variance with respect to the maximum gross floor area ratio and allowed for less than half of the required parking spaces. NCC did not demand removal of excess square footage and no one suggested that the property owners should have to forfeit their interest in the property.

5. Other projects

NCC granted a variance to 326 Associates, L.P. for reduced parking spaces where the difference between the square footage permitted by the record plan and the square footage constructed was approximately 34%. Likewise, a square footage differential of approximately 28% beyond the record plan was allowed in Golden Dove Associates. NCC allowed a 9% height differential between what was constructed and what was permissible under the Code in the Boscov's (Brennan) matter. In addition, NCC granted itself, albeit before any construction

commenced, a variance allowing for an increase in height of approximately 63% beyond Code for its police headquarters. NCC noted that the majority of the property borders a landfill and other industrial or heavy industrial zoned property.

NCC Response

In its motion, NCC conceded that “some elements of the requested relief were similar.” NCC attempts to distinguish each of the entities identified by WH for different reasons. For example, NCC asserts that in the Krishnas matter: “[N]ot only does the sheer magnitude of Plaintiff’s overbuild distinguish this request (almost 40,000 sq. ft. larger or 33 percent), but Krishnas requested only a single variance - no accompanying parking problems, no unauthorized uses or facilities, and no finding or evidence of unclean hands. In fact, the Board, as a fact-finder, rejected allegations of fraud by a disgruntled contractor and found that the overbuild was ‘truly minimal’ and ‘the result of human error.’” NCC distinguished the Golden Dove matter as having “support from the surrounding neighbors, as the appearance of the building ‘dramatically improved.’” The new police headquarters variance was requested before construction. The Boscov’s store “was over-height by a few feet [and] did not translate into any additional square footage.”

* * *

The Court finds, as a matter of law, that there are genuine issues of material fact as to whether the entities identified by WH are similarly situated.

NCC's comparisons of its actions with regard to other entities, against its actions vis-a-vis WH, merely confirm the existence of factual disputes. NCC's arguments go to the ultimate factual question of whether similarity exists. Further, some of NCC's assertions of non-similarity rely upon its prior conclusion that the other entities did not act in bad faith. Whether or not WH acted in bad faith, and intentionally overbuilt the property, is a factual issue that goes to the core of this litigation.

NCC argues that summary judgment should be granted because the undisputed facts demonstrate that NCC had an articulated rational basis for its actions with regard to WH. In the context of equal protection claims, government action must be rationally related to a legitimate government interest.¹⁴ WH bears the ultimate burden of proving that the reasons offered by NCC, for different treatment of similarly situated property owners, were arbitrary and not rationally related to legitimate local interests.¹⁵

¹⁴*Williamson v. New Castle County*, 2003 WL 549082, at *3 (Del. Ch.).

¹⁵*Eichenlaub v. Township of Indiana*, 2007 WL 205569, at *6 (3d Cir.).

WH asserts that differential treatment includes: NCC granted other property owners variances where there were significant differences between the record plan and what was built; NCC cannot identify any other instance in which it demanded the physical removal or foaming in of excess square footage; and there is no other situation where NCC has requested a deed restriction barring a landowner or any family members of the landowner from having an interest in the property for twenty years.

The Court finds that a genuine issue of material fact exists as to whether NCC had an articulated rational basis for its apparently different treatment of WH, as opposed to NCC's treatment of allegedly similarly situated landowners.

Breach of Contract

NCC concedes: "Precisely what was said in the September 25, 2001 meeting is in dispute." For purposes of summary judgment, the Court must assume the facts in the light most favorable to WH.

WH has asserted that during the meeting held on September 25, 2001, NCC entered into an agreement to issue a temporary certificate of occupancy if WH complied with the terms of a letter from NCC dated February 2, 2001. NCC subsequently referred to the February 2, 2001 letter as a "commitment." Shortly

thereafter, NCC described the letter as a useful listing of outstanding building code issues.

NCC takes the position that no contract was made during the September 25, 2001 meeting, thus NCC would not issue a certificate of occupancy until the construction was in full compliance with all applicable laws. WH claims that NCC's refusal to issue a certificate of occupancy, as agreed during the September 25, 2001 meeting, was done with the intent to undermine and interfere with WH's ability to sell the property, resulting in monetary damages. NCC argues that whatever statements were made during the meeting could not constitute a contract because the alleged promises lacked consideration.

The Court finds a factual dispute exists as to whether the prohibition of the involvement of Capano and Vietri relatives for twenty years, is a pre-existing duty or consideration for the purported contract. The Court also finds that an issue of fact exists as to whether WH's agreement to relinquish its property to a third party constitutes consideration.

Additionally, NCC claims that any such contract would have exceeded the authority of NCC. For purposes of this motion, the Court finds this argument to be without merit. As a matter of policy, government entities cannot enter into

contracts and breach them with impunity on the basis of lack of authority *ab initio*.¹⁶

NCC also asserts that there is no competent evidence of damages or a causal connection between damages and the alleged breach. WH responds that it has presented documentary support for out-of-pocket losses. Expert testimony is not mandatory on the issue of out-of-pocket damages. The admissibility of WH's damages expert opinion will be discussed *infra*.

NCC's Motion to Exclude the Expert Testimony of Erich Baum

At this time, Erich Baum has refused to appear at trial. His written opinion is inadmissible hearsay. Therefore, this motion is moot.

NCC's Motion to Exclude the Expert Testimony of William Santora

WH produced William Santora's expert report on February 22, 2007. Santora was deposed. Santora made no independent appraisal of the property. He relied on the 2000 appraisal of Hospitality Valuation Service ("HVS"). NCC argues that the HVS appraisal relies on assumptions that, while arguably reasonable at the time they were made, are now inaccurate. These assumptions include: compliance with all zoning and building codes; and opening of the hotel

¹⁶See *Middleton v. Wilmington Housing Authority*, 1994 Del. LEXIS 45, at *3-5.

by April 2000; and fail to take into account the effect on the hotel industry of the events of September 11, 2001.

The first question before the Court is whether Santora was required to conduct an independent appraisal. An expert may rely on information of the type reasonably relied upon by experts in the relevant field.¹⁷ The parties vigorously dispute whether experts in Santora's field may reasonably rely on information such as the HVC appraisal.

Courts may not substitute their own judgment for that of experts in the field as to what data an expert should rely upon in reaching an opinion. The trial court must make a factual inquiry and finding as to what data experts in the field find reliable.¹⁸ Before deciding whether Santora may testify as to damages, based upon the HVC appraisal, the Court must conduct a hearing to determine whether experts in the field reasonably rely on such appraisals not conducted by the testifying expert.¹⁹

As to the accuracy of the assumptions in the appraisal, the Court finds that issue to be a proper subject of cross-examination. For purposes of this motion,

¹⁷*Conway v. Bayhealth Medical Center, Inc.*, 2001 Del. Super. LEXIS 115, at *5.

¹⁸*India Coffee Corp. v. Procter & Gamble Co.*, 752 F.2d 891, 894-97 (3d Cir. 1985).

¹⁹Del. R. Evid 702; *Goodridge v. Hyster Co.*, 845 A.2d 498 (Del. 2004); see *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

there is an issue of fact as to whether NCC acted properly under the circumstances.

WH asserts that had NCC granted the variances, and not breached the alleged contract, the assumptions would have been accurate. Again, these are issues appropriate for cross-examination as to the weight to be given to the expert's testimony.

CONCLUSION

The Court finds that there are genuine issues of material fact: as to whether the entities identified by WH are similarly situated; as to whether NCC had an articulated rational basis for its apparently different treatment of WH; as to whether the prohibition of the involvement of Capano and Vietri relatives for twenty years, is a pre-existing duty or consideration for the purported contract; as to whether WH's agreement to relinquish its property to a third party constitutes consideration; the measure of alleged damages; and whether there is a causal connection between damages and the alleged breach. **THEREFORE, Defendant New Castle County's Motion for Summary Judgment is hereby DENIED.**

Because the witness has refused to appear at trial, **NCC's Motion to Exclude the Expert Testimony of Erich Baum is hereby DENIED AS MOOT.**

Before deciding whether Santora may testify as to damages, based upon the HVC appraisal, the Court must conduct a *Daubert* hearing to determine whether experts in the field reasonably rely on such appraisals not conducted by the testifying expert. **THEREFORE, the ruling on NCC's Motion to Exclude the Expert Testimony of William Santora is hereby held in abeyance until the conclusion of the hearing.** Plaintiff's counsel are directed to consult with judicial chambers and opposing counsel to schedule the hearing.

IT IS SO ORDERED.

The Honorable Mary M. Johnston