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May 30, 2023

VIA ELECTRONIC FILING

Honorable Renee Marie Bumb, U.S.D.J.
United States District Court of New Jersey
Mitchell H. Cohen U.S. Courthouse
1 John F. Gerry Plaza
Camden, New Jersey 08101

RE: Charles Foulke, Jr. & Lenny Reality, LLC v. Cherry Hill Township, et al.
Docket No. 23-cv-02543 (RMB/SAK)
Our File No.: 9090-3-23

Dear Judge Bumb:

Zeller & Wieliczko, LLP represents Defendants, Township of Cherry Hill and Kathleen Gaeta, Zoning Officer (hereinafter collectively referred to as “Township”), in connection with the above-captioned matter. On May 9, 2023, Plaintiffs filed a Verified Complaint in Support of Application for Writ of Mandamus. See Doc. 1. The next day, Plaintiffs filed an Order to Show Cause and Memorandum of Law in Support of Application for Writ of Mandamus. See Doc. 5 and 5-1.¹ Pursuant to Your Honor’s judicial preferences, please accept this correspondence as a request on behalf of Defendants for leave of Court to file a Motion to Dismiss Plaintiffs’ Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b), and the scheduling of a pre-motion conference to address same.

Preliminarily, and simply put, Plaintiffs are clogging this Court’s already over-crowded docket with a matter that belongs in state court, not federal court, simply because they refer to 42 U.S.C. §1983 and the words “due process.” Plaintiffs have admittedly filed an appeal from the Zoning Officer’s rescission the zoning permits with the Zoning Board of Adjustment (“ZBA”). See Doc. 1, ¶62. That matter remains pending and, as such, Plaintiffs have not yet fully availed themselves of the administrative process afforded to them under the Municipal Land Use Law, N.J.S.A. 40:55D-1, *et seq.* Thus, this matter is not ripe for adjudication. Nextel Communications of Mid-Atlantic, Inc. v. City of Margate, 305 F.3d 188, 192-93 (3d Cir. 2002). Stated differently, Plaintiffs’ failure to exhaust administrative remedies is fatal to their claim. Affinity Healthcare Grp. Voorhees, LLC v. Twp. of Voorhees, -- F. Supp.3d --, 2022 WL 3754832, at *18-*19 (D.N.J. Aug. 30, 2022).

¹ Curiously, Plaintiffs have chosen not to provide the undersigned with a courtesy copy of the complaint or order to show cause, despite specifically identifying me as counsel for the Defendants in their proposed form of order.

Assuming, *arguendo*, it were believed otherwise, Plaintiffs complaint must still be dismissed for failure to wait until the process which is available to them plays out. See Reilly v. City of Atlantic City, 532 F.3d 216, 233-36 (3d Cir. 2008) (reversing denial of summary judgment and holding that plaintiff does not state a valid due process claim where s/he resigned before taking advantage of any post-deprivation procedures available), *cert. denied*, Flipping v. Reilly, 555 U.S. 1170 (2009); Alvin v. Suzuki, 227 F.3d 107, 116 (3d Cir. 2000) (holding that in order to state a claim for failure to provide due process, a plaintiff “must have taken advantage of the processes that are available to him or her, unless those processes are unavailable or patently inadequate”).

The complaint is also subject to dismissal because neither the right to operate a business nor the property interest in a business license are “fundamental” rights or property interests protected by substantive due process. See, e.g., Wrench Tr. Sys., Inc. v. Bradley, 340 Fed. Appx. 812, 814, 815 (3d Cir. 2009) (finding “personal property ownership” interest in trucks and “right to engage in business” are not fundamental rights protected by substantive due process); Piecknick v. Pennsylvania, 36 F.3d 1250, 1262 (3d Cir. 1994) (“It is the liberty to pursue a particular calling or occupation, and not the right to a specific job, that is protected by the Fourteenth Amendment.” (citation omitted)); Fairview Ritz Corp. v. Borough of Fairview, 2013 WL 5946986, at *1, *12 (D.N.J. Nov. 6, 2013) (finding business certificate required to operate a “fitness center and day spa[,]” even though lack of certificate required plaintiff to shut down his business, was not “fundamental property interest” because certificate is indistinguishable from “the right to engage in business” which “is not fundamental under the Constitution[]”).

Even if it were believed that zoning permits do rise to the level of a fundamental property interest worthy of protection under the Fourteenth Amendment, Plaintiffs’ complaint must still be dismissed because in order to establish a substantive due process claim they must demonstrate that Defendants engaged in conduct that “shocks the conscience.” Vurimindi v. City of Philadelphia, 521 Fed. Appx. 62, 65 (3d Cir. 2013); United Artists Theatre Circuit, Inc. v. Township of Warrington, PA, 316 F.3d 392, 400 (3d Cir. 2003). Whether conduct shocks the conscience is a question of law for the court to decide. See Benn v. Universal Health Systems, Inc., 371 F.3d 165, 174 (3d Cir. 2004).

Absent claims of corruption, self-dealing, bias against an ethnic group, or intent to interfere with constitutionally-protected activity, the Third Circuit and district courts have hesitated to find official behavior in the land use context conscience-shocking. See Eichenlaub v. Twp. of Indiana, 385 F.3d 274, 286 (3d Cir. 2004); Thorpe v. Upper Makefield Twp., 271 F. Supp.3d 750, 755 (E.D. Pa. 2017), *aff’d*, 758 Fed. Appx. 258 (3d Cir. 2018); Blain v. Twp. of Radnor, 2004 WL 1151727, at *4, 5-6 (E.D. Pa. May 21, 2004), *aff’d*, 167 Fed. Appx. 330 (3d Cir. 2006). Other federal circuits have similarly found that when property rights are denied in the course of conventional municipal decision making, there is no substantive due process violation. See Chesterfield Dev. Corp. v. City of Chesterfield, 963 F.2d 1102 (8th Cir.1992) (determining that city’s bad-faith violation of state law in enforcing invalid zoning plan against development remains violation of state law and does not give rise to substantive due process violation); Harding v. County of Door, 870 F.2d 430, 431-32 (7th Cir.) (finding no substantive due process violation when county revoked building permit after construction of housing project had

commenced, notwithstanding that state reviewing court had determined the action to be illegal), *cert. denied*, 493 U.S. 853, 110 S.Ct. 154, 107 L.Ed.2d 112 (1989).

Not surprisingly, numerous district courts in this circuit have concluded that even official actions alleged to be wrong, unfair, taken in bad faith, or intended to delay do not suffice to shock the conscience, and in each instance these decisions were affirmed. See Dev. Grp., LLC. v. Franklin Twp. Bd. of Supervisors, 2004 WL 2812049, at *18 (E.D. Pa. Dec. 7, 2004) (unfair treatment of plaintiffs, however “wrong, mean, or improperly motivated” did not shock the conscience), *aff’d*, 162 Fed. Appx. 158 (3d Cir. 2006); Blain, 2004 WL 1151727, at *5 (“possible impropriety and bad faith” did not “rise to the level of a substantive due process violation”), *aff’d*, 167 Fed. Appx. 330 (3d Cir. 2006); Levin v. Upper Makefield Twp., 2003 WL 21652301, at *9 (E.D. Pa. Feb. 25, 2003) (bad motive, purposeful intention to delay permit, and senseless, premature cashing of plaintiff’s permit fee check did not shock the conscience), *aff’d*, 90 Fed. Appx. 653 (3d Cir. 2004).

Several courts in the Third Circuit have also concluded that any relationship between the challenged action and a legitimate government purpose prevents a finding that the conduct shocks the conscience. See Good v. Trish, 2007 WL 2702924, at *6 (M.D. Pa. Sept. 13, 2007) (dismissing claims because the court could not conclude that the official’s “actions bore no reasonable relation to the legitimate government interest in enforcing local land use ordinances”); Blain, 2004 WL 1151727, at *6 (concluding that “[d]efendants’ pursuit of a legitimate interest through the improper application of the Township’s ordinances does not amount to a constitutional violation”); Corneal v. Jackson Tp. Huntingdon County, Pa., 313 F. Supp.2d 457, 466 (E.D. Pa. 2003) (noting that “unless the evidence indicates that the challenged decision is completely unrelated in any way to a rational land use goal, there is no violation of substantive due process”), *aff’d*, 94 Fed. Appx. 76 (3d Cir.), *cert. denied*, 543 U.S. 871 (2004).

Simply put, the rescission of the zoning permits that is the subject of Plaintiffs’ complaint and order to show cause does not rise to the level of conscience shocking conduct as a matter of law. Alternatively, the complaint can and should be dismissed pursuant to the doctrine of abstention given the ongoing administrative appeal pending before the Zoning Board of Adjustment. See Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943); Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976).

Your Honor’s time and attention to this matter is greatly appreciated. Awaiting Your Honor’s advice, I am

Respectfully yours,

ZELLER & WIELICZKO, LLP

By: /s/ Eric J. Riso
ERIC J. RISO, Esquire

EJR:kc

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