

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

| | | |
|---------------------------|---|------------------|
| WILLIAM H. THOMAS, JR., |) | |
| d/b/a THOMAS INVESTMENTS, |) | |
| A Tennessee Sole |) | |
| Proprietorship, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | No. 06-2433 M1/P |
| |) | |
| SHELBY COUNTY, TENNESSEE, |) | |
| and the CITY OF MEMPHIS, |) | |
| TENNESSEE, |) | |
| |) | |
| Defendants. |) | |

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

Before the Court are motions to dismiss Plaintiff's federal claims for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), filed by Defendant Shelby County, Tennessee ("Shelby County" or "County") and Defendant City of Memphis, Tennessee ("City of Memphis" or "City") on July 14, 2006.¹ Plaintiff filed a response in opposition on August 21, 2006. The Court held a telephone hearing on the matter on November 21, 2006. For the reasons set forth below, Defendants' motions to dismiss Plaintiff's federal claims are GRANTED. The

¹ Although Defendant Shelby County, Tennessee and Defendant City of Memphis, Tennessee each filed individual motions to dismiss and supporting memoranda, Shelby County also "adopts the memorandum of the City of Memphis as its own." (Mot. to Dismiss, July 14, 2006, Doc. 3-1, at 1.)

case is, therefore, DISMISSED. The remaining state law claims are REMANDED to state court for disposition.

I. Background

This case arises out of Plaintiff's unsuccessful attempt to obtain permission from the Office of Construction Code Enforcement, which is operated jointly by Defendants, to rebuild two signs which had been removed, or partially removed, by previous owners. (Compl. for Declaratory J. and for Monetary Damages ("Compl."), July 7, 2006, Doc. 1-4, ¶¶ 27-29, 43-46.) The requests were rejected because the Office of Construction Code Enforcement found that the proposed signs violated provisions of the Memphis and Shelby County Joint Resolution and Zoning Ordinance No. 3064, Appendix A ("Joint Zoning Ordinance"). (Id. ¶¶ 29, 46.) When Plaintiff's requests were rejected, he appealed the decision to the Joint City of Memphis and Shelby County Board of Adjustment ("Board"). (Id. ¶¶ 32, 47.) In both instances, the appeals were denied. (Id. ¶¶ 34, 49.)

Plaintiff originally filed an action in the Circuit Court of Tennessee, seeking a declaratory judgment under state law with respect to the validity of certain provisions of the Joint Zoning Ordinance. (Id. ¶ 1.) Plaintiff also contends violation of his federal civil rights under color of law by Defendants, pursuant to 28 U.S.C. § 1983. (Id.) With respect to his claim for a declaratory judgment, Plaintiff basically alleges that certain

provisions of the Joint Zoning Ordinance are invalid because they violate state law under Tennessee Code Annotated § 13-7-208, and Memphis City Charter §§ 156 and 159.9. (Compl. ¶ 80.) With respect to his federal claims, Plaintiff alleges that in enacting and enforcing these provisions, Defendants have violated his federal civil rights, "including, without limitation, his rights to due process and equal protection, pursuant to the 5th and 14th Amendments of the Constitution of the United States of America." (Compl. ¶ 95.) Plaintiff also appears to allege a "government taking." (Id.)

This case was removed to federal court on July 7, 2006 on the basis of federal question jurisdiction pursuant to 28 U.S.C. § 1331. (Notice of Removal, July 7, 2006, Doc. 1-1, ¶ 3.) Defendants now ask the Court to dismiss Plaintiff's federal claims pursuant to Federal Rule of Civil Procedure 12(b)(6), and remand the remaining state claims to state court.

II. Standard of Review

Under Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss the plaintiff's complaint "for failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When considering a Rule 12(b)(6) motion to dismiss, a court must treat all of the well-pleaded allegations of the complaint as true, Saylor v. Parker Seal Co., 975 F.2d 252, 254 (6th Cir. 1992), and must construe all of the allegations in the

light most favorable to the plaintiff, Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

III. Analysis

It appears from the Complaint that Plaintiff has based his federal claims under 28 U.S.C. § 1983 on alleged violations of his civil rights under (A) due process, both procedural and substantive, (B) the Takings Clause of the Fifth Amendment, and (C) equal protection. The Court will analyze each of these claims individually.

A. Substantive and Procedural Due Process

A threshold requirement for establishing a violation of substantive or procedural due process is the existence of a constitutionally protected property interest or liberty interest. See Silver v. Franklin Twp., Bd. of Zoning Appeals, 966 F.2d 1031, 1036 (6th Cir. 1992); Carpenter Outdoor Adver. Co. v. City of Fenton, 251 F.3d 686, 689 (8th Cir. 2001). Without such an interest, as a matter of law, a plaintiff cannot bring a § 1983 claim alleging a violation of due process.

For there to have been a constitutionally protected property interest, Plaintiff must show that Defendants City and County lacked discretion to deny Plaintiff the right to erect the signs.

For example, in Silver, the Sixth Circuit found that a landowner's substantive due process rights were not violated when a township board of zoning appeals denied the landowner's zoning certificate. See Silver, 966 F.2d at 1036. The court held that the plaintiff had not "establish[ed] the existence of a constitutionally-protected property or liberty interest." Id. The court, in concluding that the plaintiff did not have such an interest, found that the board had the discretion to deny the plaintiff's application. According to the court, however, "if state law circumscribed the discretion of the Board members to such an extent that approval of the particular use was mandatory once [plaintiff] met certain minimal requirements, then a property interest could exist." Id. Thus, in the instant case, only if the Defendants lacked discretion would Plaintiff have a "legitimate claim of entitlement" or "justifiable expectation" to erect the signs, and therefore a constitutionally protected property interest. Id; see also Triomphe Investors v. City of Northwood, 49 F.3d 198, 202-03 (6th Cir. 1995)

Plaintiff seems to contend that the application of Tennessee Code Annotated § 13-7-208 (which sets out the rules governing legally permitted nonconforming uses) to the instant case means that Defendants lacked discretion to deny Plaintiff the right to erect the signs, and thus Plaintiff has a constitutionally protected property interest in erecting the signs. (Pl.'s

Consolidated Mem. in Opp. to Mots. to Dismiss Filed by Defs., Shelby Cty. and City of Memphis, Tennessee ("Pl.'s Mem. in Opp."), Aug. 21, 2006, Doc. 8-1, at 11-15.) Plaintiff is mistaken. The Board based its denials of Plaintiff's appeals on provisions of the Joint Zoning Ordinance. As Plaintiff appears to not have met the requirements of these provisions, the provisions gave the City and County discretion to deny Plaintiff the right to erect the signs. Furthermore, Plaintiff has not provided the Court with any facts to suggest otherwise. In other words, Plaintiff has not given the Court any reason to find that its application satisfied the pertinent requirements of the Joint Zoning Ordinance.

Rather, to support his position, Plaintiff contends that the provisions of the Joint Zoning Ordinance are contrary to state law under § 13-7-208 and are, therefore, void. (Pl.'s Mem. in Opp., Doc. 8-1, at 14.) However, even if the provisions are ultimately found to be void, city ordinances are *presumed* to be valid. See Carpenter Outdoor Advertising Co. v. City of Fenton, 251 F.3d 686, 690 (8th Cir. 2001); Baskin Auto Salvage & Machinery, Inc. v. Turner, 1987 WL 5700, at *3 (Tenn. Ct. App., Jan. 26 1987). Thus, a claim that an ordinance is invalid does not result in a "legitimate claim of entitlement" and thus a creation of a constitutionally protected property interest where one does not otherwise exist. See Carpenter Outdoor Advertising

Co., 251 F.3d at 690. Therefore, in the instant case, the provisions of the Joint Zoning Ordinance must be presumed valid for the purposes of determining whether Plaintiff has a constitutionally protected property interest in erecting the signs. Plaintiff has not provided the Court with any other reason to find that he had a constitutionally protected property interest.

Thus, taking all the well-pled allegations in Plaintiff's complaint as true, Plaintiff has not shown that it had a constitutionally protected property interest in erecting the signs. As a result, with respect to his allegations of violations of rights to substantive and due process, Plaintiff has failed to state a claim. Plaintiffs due process claims are hereby DISMISSED.

B. Taking

To the extent that Plaintiff claims a federal taking in violation of the Fifth Amendment of the U.S. Constitution,² such a claim is not ripe. "The general rule is that a plaintiff must seek compensation through state procedures before filing a federal takings claim." Carpenter Outdoor Advertising Co. v. City of Fenton, 251 F.3d 686, 690-91 (8th Cir. 2001)(quoting Von

² The Takings Clause of the Fifth Amendment--"nor shall private property be taken for public use, without just compensation"--is applied to the states through the Fourteenth Amendment. See e.g., Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 176 n.1 (1985).

Kerssenbrock-Praschma v. Saunders, 121 F.3d 373, 379 (8th Cir. 1997)); see also Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194-95 (1985). In Williamson, the Supreme Court, considering Tennessee's statutory inverse condemnation procedure, found that "[r]espondent has not shown that the inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure, its taking[s] claim is premature." Id. at 196-97. In other words, a takings claim is not ripe until such state procedures are used, or Plaintiff has shown the Court that such a procedure is "unavailable" or "inadequate."

Here, Defendants contend that "Plaintiff has failed to seek any compensation through state inverse condemnation procedures, even though these have existed since before Plaintiff acquired the rights in the sign sites in question." (Mot. to Dismiss, Doc. 2-2, at 9.) Plaintiff does not contest this assertion. Nor does Plaintiff suggest that such a course of action is "unavailable" or "inadequate." Therefore, Plaintiff's takings claim, if he has asserted one, is not ripe, and thus, as a matter of law, Plaintiff cannot state a federal takings claim. Any takings claim so asserted is, therefore, DISMISSED.

C. Equal Protection

As Defendant City of Memphis correctly states in its brief, [i]n order to establish a viable equal protection claim under § 1983 a Plaintiff must allege either (1) that he

is a member of a protected class and that he was intentionally discriminated against because of his membership in that class, or (2) if he is not a member of a protected class, that he was intentionally treated differently than similarly situated individuals and that the alleged state action bore no rational relationship to a legitimate government purpose.

(Mot. to Dismiss, Doc. 2-2, at 10)(citing Shehee v. Luttrell, 199 F.3d 295, 301 (6th Cir. 1999); Pursch v. Tenn. Tech Univ., 76 F.3d 1414, 1424 (6th Cir. 1996)). Plaintiff has not alleged either. As a result, Plaintiff has not set forth a valid federal equal protection claim, and thus Plaintiff's equal protection claim is DISMISSED.

D. Remaining State Law Claims

A district court "may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). This Court has dismissed each of Plaintiff's federal claims. Applying § 1367(c)(3), the Court declines to exercise its supplemental jurisdiction over the remaining state law claims.

IV. Conclusion

For the foregoing reasons, the Court GRANTS Defendants' motions to dismiss Plaintiffs' federal claims. This case is, hereby, DISMISSED. The remaining state law claims are REMANDED to state court for disposition.

So ORDERED this 11th day of December, 2006.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT JUDGE