

IN THE SUPREME COURT OF THE STATE OF DELAWARE

K. KAY SHEARIN,	§
	§
Plaintiff Below-	§ No. 471, 2001
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
TOWN OF ELSMERE,	§ in and for New Castle County
	§ C.A. No. 99C-10-181
Defendant Below-	§
Appellee.	§

Submitted: November 20, 2002
Decided: December 19, 2002

Before **WALSH, HOLLAND** and **BERGER**, Justices

ORDER

This 19th day of December 2002, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The plaintiff-appellant, K. Kay Shearin, filed an appeal from the Superior Court’s August 31, 2001 order granting summary judgment in favor of the defendant-appellee, Town of Elsmere. We find no merit to the appeal. Accordingly, we AFFIRM.

(2) In October 1999, Shearin filed a complaint in the Superior Court claiming that the Town of Elsmere had “[taken her] property without due process of law” and seeking “compensatory and punitive damages.” Specifically, Shearin alleged that, in or about June of 1999, the Town of

Elsmere, without notice, came into the side and back portions of her yard with earth moving equipment, destroying plant material, removing protective cinder blocks and damaging her chain link fence. Shearin further alleged that she knew the Town of Elsmere was responsible for the damage because one of her neighbors told Shearin that she saw agents of the Town of Elsmere destroying Shearin's property.

(3) In August 2000, Shearin filed a motion for leave to amend her complaint. The motion, which was unopposed, was granted by the Superior Court. In her amended complaint, Shearin alleged that, on June 7, 2000, she herself witnessed three agents of the Town of Elsmere destroying plants growing on and inside of her chain link fence.¹

(4) Approximately one year later, following written discovery and Shearin's deposition, the Town of Elsmere filed a motion for summary judgment, which Shearin opposed. At the close of the hearing on the motion, the Superior Court granted the motion for summary judgment.²

¹ Shearin further alleged that, in retaliation for the filing of her complaint, the Town of Elsmere caused its agents to bring criminal charges against her and imprison her in violation of her constitutional rights and her rights under state and federal laws, including 42 U.S.C. § 1983. Because Shearin did not address this issue in her briefs on appeal, it is deemed to be waived as a ground for appeal and will not be addressed by this Court. *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993).

² SUPER. CT. CIV. R. 56.

(5) This Court reviews the Superior Court’s decision granting summary judgment de novo.³ Summary judgment is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.⁴ In order to withstand a motion for summary judgment, the plaintiff is required to present some evidence, either direct or circumstantial, to support all of the elements of the claim.⁵ A motion for summary judgment is properly granted against a plaintiff who fails to make a showing sufficient to establish the existence of an element essential to the plaintiff’s case, and on which the plaintiff will bear the burden of proof at trial.⁶

(6) The Superior Court properly granted the Town of Elsmere’s motion for summary judgment. Shearin’s claim that the Town of Elsmere’s presence on her property and/or destruction of her plants constituted a “taking without due process” fails as a matter of law since the record is devoid of any evidence that the Town of Elsmere sought to appropriate any

³ *Telxon Corp. v. Meyerson*, 802 A.2d 257, 262 (Del. 2002).

⁴ *Id.*

⁵ *Reybold Group, Inc. v. Chemprobe Technologies, Inc.*, 721 A.2d 1267, 1270 (Del. 1998).

⁶ *Id.* at 1271(citing *Celotex v. Catrett*, 477 U.S. 317, 322 (1986)).

portion of her land for its own use.⁷ Shearin's claim that the Town of Elsmere damaged her plants in June of 1999 fails for the additional reason that there is no factual support for the claim.⁸ To the extent Shearin claims that the Town of Elsmere negligently destroyed plants in and around her property, any such claim fails as a matter of law since the Town of Elsmere is immune from such claims pursuant to the Delaware Tort Claims Act.⁹ To the extent Shearin claims that the Town of Elsmere is not entitled to immunity because it intentionally destroyed plants in and around her property, she has presented no facts in support of that claim.¹⁰ Finally, Shearin has failed to make any showing whatsoever of any damages incurred as a result of the alleged actions of the Town of Elsmere.¹¹

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

⁷ BLACK'S LAW DICTIONARY, "Eminent domain," p. 470; "Inverse condemnation," p. 740 (5th ed. 1979). *Celotex v. Catrett*, 477 U.S. at 322.

⁸ The bare allegation in Shearin's complaint that a neighbor witnessed it is insufficient to withstand a motion for summary judgment. *Reybold Group, Inc. v. Chemprobe Technologies, Inc.*, 721 A.2d at 1270.

⁹ DEL. CODE ANN. tit. 10, § 4010 et seq.(1999).

¹⁰ *Reybold Group, Inc. v. Chemprobe Technologies, Inc.*, 721 A.2d 1267, 1271 (Del. 1988) (citing *Celotex v. Catrett*, 477 U.S. 317, 322 (1986)).

¹¹ *Id.*

/s/ Randy J. Holland
Justice