IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MEL ABELE,

Plaintiff,

v. CASE NO.: 8:04-CV-1883-T26-TGW

RON ALIFF; GRANT TOLBERT;
1ST DOE; 2ND DOE; 3RD DOE,

Defendants.
_____/

DEFENDANTS RON ALIFF AND GRANT TOLBERT'S MOTION FOR SUMMMARY JUDGMENT AND SUPPORTING MEMORANDUM OF LAW

COME NOW Defendants, RON ALIFF and GRANT TOLBERT, by and through their undersigned counsel, and pursuant to Fed.R.Civ.P. 56(b), files this Defendants' Motion for Summary Judgment and Supporting Memorandum of Law, and as grounds therefore says:

1. The pleadings, deposition transcripts, Answers to Interrogatories and Admissions on file with Affidavit show that there is no genuine issue as to any material fact and Defendants are entitled to judgment as a matter of law.

2. Plaintiff's Complaint asserts one cause of action alleging that Defendants deprived him of property without due process of law.

3. Defendants are entitled to judgment on the following grounds:

(a) One or more of Plaintiff's claims against Defendants are barred by the doctrine of res judicata;

(b) One or more of Plaintiff's claims are barred by the applicable statute of limitations;

(c) On the merits, Plaintiff's claim alleging violation of due process fails to state a cause of action for which relief may be granted on the grounds that the County's ordinances are reasonably related to legitimate governmental interests, the County's executive actions do not give rise to a substantive due process claim, and the County and State provided sufficient post-deprivation remedies so as not to implicate procedural due process; and

(d) Defendants are entitled to Qualified Immunity.

4. Additional facts and citations to authority in support of this Motion are contained in the Memorandum of Law filed concurrently herewith.

5. Pursuant to this Court's Order (Doc. No. 67), the undersigned has consulted with Mr. Abele in an effort to limit the factual issues presented by this motion. Mr. Abele maintains that all code enforcement actions described in Defendants' Statement of Undisputed Facts remain at issue.

WHEREFORE, Defendant respectfully requests this Court to enter an Order granting its Motion for Summary Judgment and entering judgment in favor of the Defendants against Plaintiff and order that Defendants go hence without day.

DEFENDANTS RON ALIFF AND GRANT TOLBERT'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

I. DISCUSSION

A. Standard of Review

Summary Judgment is authorized "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate only in circumstances where "the evidence is such that a reasonable jury could [not] return a verdict for the nonmoving party." *Id.* The moving party bears the burden of proving that no genuine issue of material fact exists. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986).

In determining whether the moving party has satisfied the burden, the court considers all inferences drawn from the underlying facts in the light most favorable to the party opposing the motion and resolves all reasonable doubts against the moving party. *Anderson*, 477 U.S. at 255. The court may not weigh conflicting evidence or weigh the credibility of the parties. *See Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 919 (11th Cir. 1993) (citation omitted). If a reasonable fact finder could draw more than one inference from the facts, and that inference creates an issue of material fact, then a court must not grant summary judgment. Id. (citation omitted).

B. Legal Bars to Specific Claims

1. Statute of Limitations

42 U.S.C. §1983 omits a specific statute of limitations; therefore, the Court is to apply the most closely related State statute of limitations. *See, Owens v. Okure*, 488 U.S. 235, 49-50 (1989); *Wilson v. Garcia*, 471 U.S. 261, 76 (1985). The Eleventh Circuit applies the four-year statute of limitations codified at Fla. Stat. §95.11(3). *Burton v. City of Belleglade*, 178 F.3d 1175, 88 (11th Cir. 1999); *Baker v. Gulf & Western Industries, Inc.*, 850 F.2d 1480, 83 (11th Cir. 1988). The instant lawsuit was filed on August 16, 2004 (Docket No. 1) and, therefore, all claims arising before August 16, 2000 are time-barred. Thus, Mr. Abele cannot maintain the present cause of action with respect to any issue arising out of county actions relative to: (1) real property located at 16383 Seminole Boulevard; (2) property located at 14-22 Magnolia Avenue; or (3) the destruction of Mr. Abele's 60' boat and the removal of debris thereafter. Lastly, Mr. Abele's claim that electric power was wrongfully removed from 6220 DeSalle Street, Brooksville, Florida is also time-barred.

2. Res Judicata

The doctrine of res judicata precludes re-litigating claims where (1) there has been final judgment; (2) rendered by a Court of competent jurisdiction; (3) between identical parties, or those in privity with the parties; and (4) which involve the same cause of action. *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 38 (11th Cir. 1999); *Citibank, N.A. v. Data Lease Financial Corporation*, 904 F.2d 1498, 1501 (11th Cir. 1990). Applying those elements to the present case, it is clear that Mr. Abele filed a previous lawsuit with

this Court alleging that Hernando County violated his rights to due process as guaranteed by the Fourteenth Amendment and that claim was adjudicated on the merits in the form of a summary judgment which was affirmed on appeal. With the exception of code enforcement actions that were initiated against 6220 DeSalle Street and 16369 Seminole Boulevard after Judge Bucklew's judgment, the facts giving rise to the present litigation are exactly the same as the facts giving rise to the claims that were previously disposed of by this Court; the sole difference is the named Defendants.

The Eleventh Circuit has adopted the "prevailing rule" in Federal Courts that a judgment exculpating an employer from liability on a claim forecloses a subsequent claim against the employer's servants or agents in a subsequent suit for the same claim. *Citibank*, 904 F.2d at 1502 (citations omitted). This general rule should be applied under the facts of the present case for two compelling reasons. First, both individuals enjoy qualified immunity from suits brought under §1983. *Pierson v. Ray*, 386 U.S. 547, 57 (1967). In order to defeat qualified immunity, Mr. Abele bears the burden of proving that the contours of his rights were sufficiently clear that a reasonable official would have understood that his actions violated Mr. Abele's rights. *Anderson v. Creighton*, 483 U.S. 635, 40 (1987). However, this Court has previously held that Mr. Abele's due process rights were not violated with respect to the specific factual complaints he raised. In order to prevail against the individual Defendants, this Court would have to reverse that holding, which has already been affirmed and has now become the law of this case. *See gen., Piambino v. Bailey*, 757 F.2d 1112, 20 (11th Cir. 1985) (District Courts are not free to deviate from Appellate Court Mandates, unless (1) there is presentation of new

evidence; (2) there is an intervening change in controlling law; or (3) the Appellate decision is clearly erroneous and, if implemented, would work manifest injustice). Thus, the judgment in favor of Hernando County compels judgment in favor of its agents.

Secondly, Hernando County, as a legal entity, can only act through its agents. The actions that gave rise to Mr. Abele's claim against the County were transacted by the County's employees, Messrs. Tolbert and Aliff. Therefore, the transactions that gave rise to Mr. Abele's claim against the County are the same that give rise to his claims against these individuals in their individual capacity; this is, of course, the very definition of privity. Black's Law Dictionary, p. 1217 (1999, 7th Ed.) (defining privity as the "relationship between two parties, each having a legally recognizable interest in the same subject matter… ."). Therefore, the doctrine of res judicata should be applied to preclude Mr. Abele from bringing any claim other than (1) the code enforcement activity initiated against 6220 DeSalle Street and 16369 Seminole Boulevard, following Judge Bucklew's disposition of Hernando County's Motion for Summary Judgment.[1]

C. Fourteenth Amendment Due Process

Mr. Abele's due process theory is vague in that it fails to identify the type of constitutional protection he is seeking. The Fourteenth Amendment contemplates two types of constitutional protection: substantive due process and procedural due process. *McKinney v. Pate*, 20 F.3d 1550, 1555 (11th Cir. 1994). Also, the due process analysis differs depending on whether the challenge is made to a legislative enactment or an executive act of government. *See, Sullivan Properties, Inc. v. City of Winter Springs*, 899

[1] See Statement of Facts, pp. 15-16.

F. Supp. 587, 595-96 (M.D. Fla. 1995). Therefore, Defendants will consider Mr. Abele's due process rights relative to the legislative enactments applied to his properties, the executive acts taken with respect to his properties and, finally, the procedures that were provided to redress such actions.

1. <u>Challenge to Ordinances</u>

Substantive due process challenges that do not implicate fundamental rights are reviewed under the highly differential rational basis standard. *Schwartz v. Kogan*, 132 F.3d 1387, 1390 (11th Cir. 1988). In order to prevail such claim, Mr. Abele must demonstrate that he was deprived of a constitutionally protected interest and that the deprivation was caused by a regulation which was pretextual, arbitrary and capricious, and without any rational basis. *Reserve, Ltd. v . Town of Longboat Key*, 17 F.3d 1374, 79 (11th Cir. 1994). However, an ordinance is not arbitrary if it is reasonably related to a legitimate governmental purpose. *Bannum, Inc. v. City of Ft. Lauderdale, Florida*, 157 F.3d 819, 22 (11th Cir. 1988) (citations omitted); *Sullivan*, 899 F. Supp. at 595-96 (citations omitted). Here, the unsafe building abatement code that was originally adopted by the County and the Florida Building Code subsequently adopted by the County, provided standards to ensure the structural, electrical and plumbing integrity of residences. On their face, these standards are reasonably related to the safety and health of the County's residents. As a matter of law, public safety is a legitimate goal of government. *See e.g., Bannum, Inc.*, 157 F.3d at 823. Therefore, inasmuch as Mr. Abele challenges the enactment of ordinances that regulate his property, such challenge must fail and Defendant is entitled to judgment as a matter of law.

2. Challenge to Executive Acts

The crux of Plaintiff's Complaint, however, is that Messrs. Tolbert and Aliff have interfered with Mr. Abele's property rights. Such claim implicates executive functions. However, the source of the County's regulatory power to interfere with privately-held property rights, arises from inherent state police power. *Sullivan Properties*, 899 F. Supp. at 595 ("the source of all zoning regulations is state law and local ordinance, not the Constitution.") In order to invoke the substantive component of the due process clause for executive functions, Plaintiff must identify a right that is constitutional or fundamental, *i.e.*, a right that is implicit in the concept of ordered liberty. *McKinney*, 20 F.3d at 1556 (*citing*, *Palco v. Connecticut*, 302 U.S. 319, 325 1937)). Mr. Abele's rights are state granted, not constitutional; therefore, the rights that Mr. Abele has identified do not implicate the substantive component of the due process clause. *Greenbriar Village, L.L.C. v. Mountain Brook*, 345 F.2d 1258, 63 (11th Cir. 2003) (non-legislative deprivations of state-created property rights, including land-use rights, "cannot support a substantive due process claim… even if the Plaintiff alleges that the government acted aribtrar[il]y and irrationally."); *see also*, *McKinney*, 20 F.3d at 1556 (*citing*, *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 219 1985). Therefore, inasmuch as Plaintiff attempts to make a substantive due process claim with respect to interference of property rights, Hernando County is entitled to judgment as a matter of law.

3. **Procedural Due Process**

The Due Process Clause of the Fourteenth Amendment requires a private citizen be given notice and opportunity to be heard before a governmental official seizes his property. *Quik Cash Pawn & Jewelry, Inc. v. Sheriff of Broward County,* 279 F.3d 1316, 1322 (11th Cir. 2002). In analyzing such a claim, the Court should examine whether (1) the plaintiff had a property interest of which he was deprived by state action, and (2) the plaintiff received sufficient process regarding that deprivation. *Ross v. Clayton County, Ga.*, 173 F.3d 1305, 1307 (11th Cir. 1999). With respect to the second prong of this examination, the Court must examine the adequacy of all remedies available to the plaintiff in order to ascertain whether these remedies are so inadequate as to violate clearly established law. *Bussinger v. City of New Smyrna Beach, Florida*, 50 F.2d 922, 926 (11th Cir. 1995).

There were adequate state remedies available to Abele with respect to each of the alleged property deprivations. First, the Statement of Facts shows that each of the alleged property deprivations were effected (1) after field inspectors found violations of the building code ordinance and provided notice of the violations to the respective owners of the property or (2) were committed pursuant to a court order. Next, Mr. Abele could have challenged the findings of the Hernando County field inspectors, acting under the auspices of the building code ordinances, by filing an appeal with the Hernando County Board of Adjustments and Appeals. *See* Chapter 4 of Hernando County Standard Building Abatement Code; Hernando County Ordinance No. 2001-22, §108. The decision of the Hernando County Board of Adjustment and Appeals could have been

appealed to the state's circuit court. *See*, §26.012(1), Fla. Stat. Last, regarding Hernando County's destruction of Mr. Abele's boat, a state circuit court issued an order allowing Hernando County to destroy the boat. Mr. Abele could have appealed that decision to a higher state court. Because there were adequate state remedies available to Mr. Abele with respect to each of the alleged property deprivations, Hernando County is entitled to judgment with respect to Mr. Abele's procedural due process claims.

D. Qualified Immunity

As public officers, both Messrs. Tolbert and Aliff are entitled to good-faith or qualified immunity for actions arising under 42 U.S.C. §1983. *Pierson*, 386 U.S. 557. Qualified immunity extends to public officials acting within their discretionary authority provided that the actions complained of are not contrary to clearly established constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity is immunity from suit rather than a defense to liability and it is effectively lost if a case is permitted to go to trial. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). In order to defeat qualified immunity, Mr. Abele bears the burden of proving that the contours of his rights were sufficiently clear such that reasonable officials in Messrs. Tolbert and Aliff's positions would understand that their actions violated Mr. Abele's rights. *Leeks v. Cunningham*, 997 F.2d 1330, 33 (11th Cir. 1993) (establishing that Plaintiff bears the burden of proof); *Anderson*, 483 U.S. at 637 (establishing the burden to be met).

In the present case, it is difficult to understand how Messrs. Tolbert and Aliff could possibly violate Mr. Abele's due process rights. To begin with, Mr. Abele readily

acknowledged that Messrs. Tolbert and Aliff's actions are reviewable and in most cases have been reviewed by State Courts.[2] Therefore, even if Messrs. Tolbert and Aliff were engaged in targeted code enforcement, they lacked power to prevent Mr. Abele from having their conduct reviewed and reversed. Therefore, they also lacked the power to deprive Mr. Abele of his due process rights. This, together with the fact that Mr. Abele has failed to demonstrate a deprivation of due process in the first instance demonstrates that Mr. Abele cannot overcome the qualified immunity enjoyed by both Messrs. Tolbert and Aliff. Therefore, both Defendants are entitled to judgment on the basis of qualified immunity.

II. CONCLUSION

Defendants find it ironic that Mr. Abele continues to assert that he has been denied due process. By Defendants' count, Mr. Abele has filed approximately ten (10) lawsuits against Hernando County in the State Court, three (3) lawsuits in the United States Federal District Court, and numerous appeals from all trial courts. Every Court that has reviewed Mr. Abele's claims has liberally construed his pleadings and other filings in consideration of his *pro se* status and to ensure his opportunity to be heard. The fact that Mr. Abele has not prevailed, does not translate into a denial of an opportunity to be heard and persuade. Mr. Abele has been provided with all process that is due him. Consistent with all of the other Courts that have heard Mr. Abele's claims, this Court

[2] Mr. Abele also acknowledges that the actions of the building officials are reviewed by a Code Enforcement Board, but he has failed to avail himself of that review because of the cost involved and because he subjectively believes that such a review would be futile. Pl. depo. II, pp. 74, lines 19 - p. 75, line 16.

should grant judgment in Defendants favor with respect to Mr. Abele's due process claim and retain jurisdiction for the appropriate assessment of fees and costs, if applicable.

WHEREFORE, Defendants respectfully request this Court enter an Order granting this Motion for Summary Judgment, ordering the Clerk to enter judgment thereon, that Plaintiff take nothing from this action, and that Defendants go hence with out day.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to the Clerk of Court and by first class U.S. Mail to:

Mr. Mel Abele
6099 Patricia Place
Spring Hill, FL 34607

this 2nd day of November, 2006.

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