

No. 89-303

IN THE SUPREME COURT OF THE STATE OF MONTANA

1989

JOHN DUNCAN,

Plaintiff and Appellant,

-vs-

CITY OF MISSOULA,

Defendant and Respondent.

APPEAL FROM: District Court of the Fourth Judicial District,  
In and for the County of Missoula,  
The Honorable Ed McLean, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Arthur D. Agnellino; Due Process Legal Clinic, Missoula,  
Montana

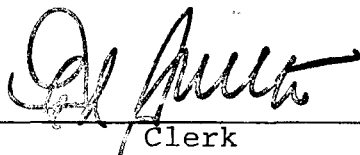
For Respondent:

Jim Nugent, City Attorney, Missoula, Montana

Submitted on Briefs: Aug. 31, 1989

Decided: September 18, 1989

Filed:

  
Clerk

Mr. Justice John C. Sheehy delivered the Opinion of the Court.

The plaintiff, John Duncan, filed suit against the City of Missoula to prevent the planting of trees in the boulevard area of the sidewalk in front of plaintiff's downtown property. Following submission of motions on briefs, the District Court for the Fourth Judicial District, Missoula County, dismissed plaintiff's complaint for failure to state a cause of action. From that judgment, plaintiff appeals. We dismiss the appeal as frivolous.

John Duncan owns various properties in the Missoula downtown central business district. When public sidewalks in front of his building at 227-235 West Main were replaced, two tree well openings were left for the planting of two small-leaved honey-locust trees. Similar plantings were made in the downtown area as sidewalks were repaired.

Duncan expressed opposition to the planting at a City Council Public Works Committee meeting on April 26, 1988. Duncan's impression from that meeting was that no trees would be planted at Duncan's location, and Duncan was notified that his wish would be honored.

Tenants in Duncan's building and others shortly thereafter submitted a petition to the city requesting that trees be planted, the committee recommended planting to the Missoula City Council, which then approved such planting on September 12, 1988. Duncan was informed of the decision, and he proceeded to file a motion for temporary restraining order in the District Court. The temporary restraining order was granted on September 20, 1988. Defendant City of Missoula moved the court to dissolve the temporary restraining order

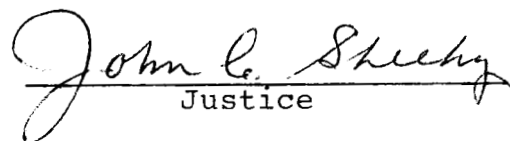
and to dismiss the proceeding. On December 2, 1988, the order was dissolved and the proceedings dismissed.

On December 15, 1988, Duncan filed a complaint in the District Court alleging breach of contract, unreasonable interference with property, and arbitrary action. The City moved to dismiss pursuant to Mont. R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. On March 29, 1989, the District Court dismissed Duncan's complaint.

The District Court was correct in its dismissal of the case. Duncan argues that the commitment of the Public Works Committee was tantamount to an oral contract. No facts bear this out. The Committee's statement that no trees would be planted if he objected does not create a contract binding upon the City. Not only are the elements of a contract missing here, but no action of the City Council itself created a contract as required by § 7-5-4121, MCA.

Duncan's argument that the planting of trees on the walkway is not a reasonable use of the public easement also lacks merit. Main Street here is a dedicated public way, and the City Council has broad powers to alter and maintain streets and avenues. Section 7-14-4101, MCA. As such, the City has the right to maintain and improve the street, including the planting of trees.

Finally, Duncan's contention that the City acted arbitrarily and capriciously must fail. Action taken by a City Council, well within its power to act, cannot constitute arbitrary or capricious action. Accordingly, this appeal is dismissed as frivolous.

  
Justice

We Concur:

J. A. Tamm  
Chief Justice

John Conway Harrison

R. C. McLaughlin

R. C. Anderson  
Justices