

<b>C&amp;D Design v Village of Alexander</b>
2021 NY Slip Op 33611(U)
January 20, 2021
Supreme Court, Genesee County
Docket Number: Index No. 65440
Judge: Charles N. Zambito
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF GENESEE

---

C&D DESIGN

Plaintiff,

v.

Index No.: 65440

VILLAGE OF ALEXANDER,

Defendant

---

David P. Marcus, Esq.  
Attorney for Plaintiff

James M. Wujcik, Esq.  
Attorney for Defendant

-----

**DECISION AND ORDER**

-----

**CHARLES N. ZAMBITO, J.**

Plaintiff brought the above action for monetary damages and injunctive relief pursuant to 42 USC 1983. Specifically, the Plaintiff's amended complaint claims that Defendant Town of Alexander, by its Code Enforcement Officer, Defendant Lang, illegally condemned a building he owns in violation of his constitutional right to due process, equal protection and free speech.

Defendant previously moved to dismiss the amended complaint, arguing that the Plaintiff failed to state a cause of action, that the complaint is time barred, and that a defense is founded upon documentary evidence (CPLR 3211(a)(1), (5), (7)). The Plaintiff opposed the motion and cross moved for an

Order directing the Defendant's to remove the placard from the building, and thereby essentially lift the previously imposed condemnation order.

In a decision and order dated December 18, 2018, this Court (Hon. E. Colaiacovo, presiding) converted the Defendant's motion to dismiss to a motion for summary judgment (CPLR 321(c)), and ultimately granted the Defendant's motion to dismiss and denied the Plaintiff's cross motion. Upon appeal, the Appellate Division Fourth Department issued a decision dated August 20, 2020 which modified this Court's original order by reinstating the amended complaint. That decision also held that the Plaintiff's 42 USC 1983 claim was not subject to dismissal on statute of limitations grounds (CPLR 3211(c)(5)) and affirmed the denial of the Plaintiff's motion to remove the placard and lift the condemnation of his building. The matter was thus remitted to this Court for further proceedings.

The case was next conferenced with the Court on September 27, 2020. In a letter dated November 12, 2020, the Court indicated to counsel that it intended to consider the Defendant's motion as one for summary judgment, and solicited further submissions from the parties. After receipt of Memoranda from both the Defendants and Plaintiff, and hearing oral argument on December 17, 2020, the matter was deemed finally submitted.

In order to prevail on a motion for summary judgment, the moving party must demonstrate entitlement to judgment as a matter of law by tendering evidence sufficient to eliminate any material issues of fact (Zuckerman v. City of New York, 49 NY2d 557). The proof must be analyzed in a light most favorable to the party opposing the motion, giving that party the benefit of every

reasonable inference (Silliman v. Twentieth Century-Fox Film Corp, 3 NY2d 395; Esposito v. Wright, 28 AD3d 1142), and such relief must not be granted where there is any doubt as to the existence of a triable issue of fact (Rotuba Extruders v. Ceppos, 46 NY2d 223).

With respect to the due process claim<sup>1</sup>, the Plaintiff asserts, and the Defendant essentially concedes, that he has a protected property interest which was affected by the actions of the Town. In order for the Court to decide if the Defendant's actions violated the Plaintiff's right to due process, it must determine what process is due the Plaintiff under the circumstances and whether such process was afforded to the Plaintiff in this case (see generally Matthews v. Eldridge, 424 US 319).

In this regard, the Defendant argues that the condemnation of the building was motivated by legitimate concerns for the health, safety and welfare of the occupants/residents thereof, and was undertaken in compliance with the applicable regulations governing such actions. However, as argued by the Plaintiff, "the fact that the Code Enforcement Officer purported to act pursuant to various sections of the State Property Maintenance Code does not mean that his actions are shielded from constitutional scrutiny" (Breon v Perales, 2015 WL 7289399, U.S. District Court, WDNY). The purest intentions and the strictest adherence to building codes do not relieve a government agency of its obligation to afford affected citizens their constitutional due process rights. The record at this point is not entirely clear as to what process was afforded the Plaintiff to challenge the Town's decision to condemn the building, or whether that process

was constitutionally adequate.<sup>2</sup> Because this fundamental question of fact exists, the Defendant's motion for summary judgment on the Plaintiff's procedural due process claim must be denied.

Further, because the proof in the record is lacking with respect to the specific bases and rationale for the Defendant's immediate condemnation of the Plaintiff's building, a question of fact exists as to whether that action was wholly without legal justification. The Defendant's motion for summary judgment with respect to the Plaintiff's substantive due process claim is likewise denied (Bower Associates v. Town of Pleasant Valley, et al, 2 NY<sup>3</sup> 617).

Turning next to the Plaintiff's equal protection cause of action, such a claim "arises where..., a person (compared with other similarly situated) is selectively treated and... such treatment is based upon impermissible considerations such as race, religion, intent to inhibit or punish the exercise of a constitutional right or malicious or bad faith intent to injure a person" (Bower Assoc. v. Town of Pleasant Valley, ibid).

In this regard, the Plaintiff has not sufficiently alleged the existence of any similarly situated individuals or entities who were treated differently by the Defendant's so as to raise a triable issue of fact with respect to that element of his equal protection claim. Mere speculation that such individuals exist and would be revealed during the process of discovery is insufficient to overcome the Defendant's motion for summary judgment (see Kaufman Carousel, Inc.v. Carousel Center Co., LP, et al, 87 AD<sup>3</sup> 1343). This Plaintiff's equal protection cause of action is dismissed accordingly.

Finally, a First Amendment retaliation claim arises when a Plaintiff alleges a protected free speech interest, that the Defendant's allegedly retaliatory actions were motivated or substantially caused by the exercise of that right, and that the Defendant's actions effectively chilled the Plaintiff's exercise of that First Amendment right (Butler v. City of Batavia, et al, 323 Fed. Appx. 21, US Court of Appeals, 2<sup>nd</sup> Circuit 2009).

Upon this record, the Plaintiff has failed to raise a triable issue of fact with respect to the causal connection between his exercise of free speech and the alleged retaliatory action, "ether indirectly, by showing that the protected activity was followed closely by the retaliatory treatment, or directly, through evidence of retaliatory animus directed against the Plaintiff by the Defendant." (Calhoun v. County of Herkimer, et al, 114 AD<sup>3</sup> 1304). The vague timeframe provided by the Plaintiff regarding his statements which were critical of local government officials, described as occurring in '2002' or 'some time prior to the incidents which are the subject of this lawsuit', are insufficient to make a prima facie showing of an indirect connection between the protected speech and the alleged retaliatory acts. This is particularly true where, as here, the Defendant Town took favorable action toward the Plaintiff after at least some of his critical comments by issuing a building permit and a certificate of occupancy to him. Likewise, Plaintiff has failed to allege facts sufficient to suggest a direct connection between the Plaintiff's exercise of his First Amendment right and the condemnation of the building (Butler v. City of Batavia, et al, ibid). Finally, the Plaintiff does not allege any facts which demonstrate that his right to free speech were actually chilled by

the Defendant's actions (Sonne v. Board of Trustees of Suffern, 67 AD<sup>3</sup> 192).

The Plaintiff's cause of action alleging a violation of his First Amendment rights is denied accordingly.

The foregoing constitutes the Decision and Order of the Court. The matter is hereby scheduled for a virtual conference with the Court on February 26, 2021 at 2:30 pm.

Dated: January 20, 2021  
Batavia, New York



HON. CHARLES N. ZAMBITO  
Acting Supreme Court Justice

1. At no time during these proceedings has the Defendant argued that 42 USC 1983 is an improper vehicle for the Plaintiff's claims.
2. The record is likewise inadequate for the Court to conclude that an emergency existed which was sufficient to justify the immediate condemnation of the building, without providing a hearing prior thereto (Tartaro v City of Syracuse, 2015 WL 4094665 US District Ct. WDNY)