IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ronald G. Allen, Florence C. Allen, and Allen Auto Sales and Service, Appellants	:	
v.	:	
Police Chief Eric Bistline and Fairview Township Board of Supervisors	:	No. 1047 C.D. 2007
	:	Submitted: September 28, 2007

BEFORE: HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge*
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE COLINS **FILED: February 13, 2008**

Appellants Ronald G. and Florence C. Allen and Allen Auto Sales and Service (Allen) appeal an Order of the York County Common Pleas Court (trial court) granting the summary judgment motion of Appellees Police Chief Eric Bistline and the Fairview Township Board of Supervisors. We affirm.

This case had its genesis on November 13, 1996, when Police Chief Bistline notified Allen that "[i]n light of the recent Ordinance violations involving vehicles stored at your facility, it is necessary to suspend Allen's

*The decision in this case was reached after the date that Judge Colins assumed the status of senior judge.

Auto Sales and Service as an authorized towing agency until these violations are corrected." The ordinance violations referred to in the police chief's notice concerned a junk yard license for Allen's facilities. Those violations were the subject of a protracted zoning dispute between Allen and the Township that was eventually settled by a court-approved stipulation on May 10, 2002.

On July 5, 2002, Allen filed a mandamus complaint against Chief Bistline and the Township for refusing to reinstate Allen Auto Sales and Service as an authorized towing agency in the Township. There followed a series of preliminary objections and amended complaints, culminating in Allen's filing, with leave of court, a third amended complaint on October 3, 2005, this time seeking injunctive relief and damages. That complaint, like those before it, alleged that the Police Chief and township, in removing Allen from the authorized towing agency list and refusing to reinstate it, had violated federal constitutional equal protection, and substantive and procedural due process guarantees,[1] and was brought pursuant to 42 U.S.C. §1983. On January 17, 2006, Bistline and the Township filed a motion for summary judgment; Allen filed an answer to that summary judgment motion July 6, 2006. The trial court granted the motion for summary judgment February 16, 2007.[2]

In its opinion supporting the order granting summary judgment, the trial court determined that Allen's July 2002 complaint was time-barred because it was not commenced within two years of the time Allen knew or should have known of the violations that caused the injury. The trial court

[1] U.S. Const. Amend. 14.

[2] Allen appealed the trial court's order granting summary judgment to Superior Court, which transferred the appeal here.

found that the alleged constitutional violation causing the injuries occurred in November 1996, when Chief Bistline issued the notice of suspension from the Township's authorized agency list. It held that there was no genuine issue of any material fact concerning Allen's knowledge of the 1996 suspension, and that therefore the defendants police chief and township were entitled to judgment as a matter of law, since the two-year statute of limitations for §1983 actions had expired by the time Allen brought its July 2002 complaint.

Allen now contends on appeal that the trial court erred in its determination that the complaint was time-barred. The Township's repeated refusal to reinstate Allen to the authorized list, the last refusal occurring on June 3, 2002, constituted a continuing violation, and therefore the §1983 action was timely. *Nicolette v. Caruso,* 315 F. Supp.2d 710 (W.D. Pa. 2003). Allen also contends that the Township and Police Chief did not affirmatively raise the statute of limitations defense in a responsive pleading, as new matter, and therefore this defense was waived under Pennsylvania Rule of Civil Procedure 1030(a), Pa. R.C. P. No. 1030(a).

The Township and Police Chief counter that the trial court was correct in its determination, because a §1983 claim accrued, if at any time, when the discrete act of suspension from the approved list occurred in 1996; the refusal of Allen's subsequent reinstatement requests only confirmed the permanence of that act. *O'Connor v. City of Newark,* 440 F.3d 125 (3d Cir. 2006). The Township and Police Chief also contend that Allen's allegation that the statute of limitations defense was waived is not supported by the record, which will show that it was raised in the answer to the first amended complaint. Finally, they argue that Allen's §1983 complaint would have been properly dismissed in any event, since they could not show that the

actions of the Township or Police Chief deprived them of a cognizable liberty or property interest or had the effect of discriminating on the basis of impermissible considerations. As a threshold matter, however, the Township and Police Chief argue that *all* of the issues Allen raises on appeal are waived for failure to comply with Pennsylvania Rule of Appellate Procedure 1925(b). Pa. R.A.P. 1925(b). We will consider this argument first.

Rule 1925(b) requires the appellant, when directed by the trial court to do so, to state the issues to be raised as grounds for the appeal. The 1925(b) rule in effect at the time of Allen's appeal, stated:

> The Lower court forthwith may enter an order directing the the appellant *to file of record in the lower court and serve on the trial judge a concise statement of the matters complained of on appeal no later than 14 days after entry of such order.* A failure to comply with such direction may be considered by the appellate court as a waiver of all objections to the order, ruling or other matter complained of.

(emphasis added).

Our Supreme Court held in *Commonwealth v. Lord*, 553 Pa. 415, 719 A.2d 306 (1988), that failure to comply with the requirements of Rule 1925(b) will result in automatic waiver of the issues raised, and the Court has continued to reaffirm its holding.[3] In this case, the appellee Township and Police Chief argue that Allen failed to comply because it did not serve its 1925(b) statement on the trial judge. The record establishes that Allen's counsel filed the 1925(b) statement with the prothonotary and forwarded a

[3] *See, e.g., Commonwealth v. Castillo*, 585 Pa. 395, 888 A.2d 775 (2005).

copy of it to the court administrator, asking the court administrator to present the copy to the trial judge.[4]

We are aware that the Superior Court has rejected the argument that because a 1925(b) statement is available to the trial court through the court's docket system or clerk's office, failure to serve it on the trial court itself does not effect a waiver of all issues raised. *Forest Highlands Community Association v. Hammer,* 879 A.2d 223 (Pa. Super. 2005); s*ee also Schaefer v. Aames Capital Corp*., 805 A.2d 534 (Pa. Super 2002). However, we decline to find in this case, where the 1925(b) statement was directed to the court administrator with the specific request that it be given to the trial judge, and where the trial judge in a Rule 1925(a) supporting memorandum explicitly acknowledged Allen's timely filing of a 1925(b) statement, that service on the trial judge was not effected and that therefore all appeal issues were waived. We now proceed to those issues.

Allen contends that the trial court should not have considered the statute of limitations question at all, because it was not properly raised. The pleadings indicate that the statute of limitations defense was raised as an affirmative defense in new matter to the *first* amended complaint, but that in response to subsequent complaints, the statute was raised by preliminary objections, not as new matter. Allen filed preliminary objections to those preliminary objections, citing non-conformance to the Pennsylvania Rules of Civil Procedure. However, the Township and Police Chief incorporated their answer to Allen's first complaint in their subsequent pleadings, and the statute issue was briefed and argued by the parties and considered by the trial court. Thus, we will review it.

[4] The record contains no reference to, and the parties make no mention of, the local rules of court regarding service of post-trial submissions.

We are inclined to agree with Allen that, if a cognizable §1983 claim were made out, the circumstances here would give rise to application of the "continuing violations" doctrine, as it was applied in *Nicolette v. Caruso*, on which Allen relies. There, the United States District Court held that "when a defendant's conduct is part of a continuing practice, a civil rights action is timely under the 'continuing violations doctrine' so long as the last act evidencing the continuing practice falls within the limitations period." 315 F. Supp. at 723-724.

Chief Bistline's November 13, 1996 letter advised "it was necessary to suspend Allen's Auto Sales and Service as an authorized towing agency *until these violations are corrected.*" Thus, at the time it received this suspension notice, Allen could have anticipated reinstatement at some time after certain conditions occurred. The record also indicates that Allen made repeated requests for reinstatement, which were refused "until all litigation…[is] resolved," the final request being made a month after the zoning dispute was settled. We agree with Allen that its claim did not accrue, if at all, until the last refusal to reinstate on June 3, 2002. There was nothing in the 1996 suspension notice to indicate removal from the list was permanent, irrevocable, or for a finite period; there was no degree of permanency in it. Thus, we do not see the 1996 suspension notice falling under the rubric of *Moiles v. Marple Newtown School District*, No. 01-4526, 2002 U.S. Dist. LEXIS 15769, 9-10 (E.D. Pa., August 23, 2002) and *O'Connor*, on which the Police Chief and Township rely, describing permanent, discrete actions that toll the statute of limitations.[5]

[5] We note that those cases involved challenges to employment actions that were one-time, permanent decisions.

However, we will affirm the trial court's order on other grounds because we conclude that Allen failed to state a cause of action under 42 U.S.C. §1983. To prevail on such a claim, a plaintiff must prove that the defendants (1) acted under color of state law; (2) deprived him or her of a right secured by federal law; and (3) caused harm. *Sameric v. City of Philadelphia,* 142 F.3d 582 (3d Cir. 1998). Allens' complaint asserts substantive and procedural due process and equal protection violations caused by the Township's continued refusal to reinstate it to the police department's authorized tow list.

To make out a substantive due process claim, a plaintiff must establish that he or she has a protected property interest to which our federal Constitution's due process protection applies. Whether a property interest is protected by substantive due process depends on whether that interest is fundamental under the United States Constitution. *Nicholas v. Penn State University*, 227 F.3d 133, 141 (3d Cir. 2000). Not all state-created property interests "worthy of *procedural* due process are protected by the concept of *substantive* due process." *Id.* at 139. Allen cites no authority, and we know of none, for the proposition that the mere expectation of being on a township's towing list is a fundamental property interest recognized by the U.S. Constitution. *See, e.g., Nicholas* (public sector employment); *Holt Cargo Systems, Inc. v. Delaware River Port Authority,* 20 F.Supp. 2d 803 (E.D. Pa. 1998) (lease of state land and expectation of business); *Envirotech Sanitary Systems v. Shoener,* 745 F. Supp. 271 (M.D. Pa. 1990) (state-issued landfill permit).

To make out its procedural due process claim, Allen must establish that a person or persons acting under color of state law deprived it of a protected interest and that the procedure for challenging the deprivation does

not satisfy the requirements of notice and a meaningful opportunity to be heard. *Midnight Sessions, Ltd v. City of Philadelphia*, 945 F.2d 667 (3d Cir. 1991). There must be a legitimate claim of entitlement created by an independent source such as state law. *Id.*

The federal courts have addressed the question of whether an authorized towing list creates a liberty or property right subject to due process protections. In *Piecknick v. Commonwealth*, 36 F.3d 1250 (3d Cir. 1994), the Third Circuit Court of Appeals concluded that a Pennsylvania State Police guideline setting forth procedures to follow in placing towing calls on certain portions of interstate highways was not a regulation for purposes of giving the towing operator a protectable property interest giving rise to a §1983 claim. The court held there that no property interest was created, either by statute, regulation or mutual understanding of the parties, by the mere promulgation of an agency guideline. The court distinguished a number of cases in other jurisdictions finding a protectable interest on the grounds that, in each of those cases, a statute or regulation governed placement and removal from an authorized towing list. In *Garner v. Township of Wrightstown*, 819 F. Supp. 435 (E.D.Pa 1993), the district court concluded that, while a towing and salvage operator may have stated at most a claim for breach of contract on revocation of his township towing privileges,[6] no deprivation of a constitutional right occurred, because there was no constitutionally protected entitlement.

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[6] In *Crawford's Auto Center v. Pennsylvania State Police*, 665 A.2d 1064 (Pa. Cmwlth. 1995), we held that an implied contracted existed between the Pennsylvania State Police and a towing and storage company that PSP troopers had regularly directed to tow and impound allegedly stolen vehicles. Allen makes no such claim that the police department's course of conduct created a contract here, but only that, in some fashion, a third-party beneficiary contract existed between the Township and potential tow customers.

In this case, the Police Chief issued a series of "general orders" on vehicle towing requiring the police department to maintain a list of all towing agencies that complied with police regulations and were available for 24-hour towing. The orders established guidelines for police personnel to follow when towing was required and divided the township geographically for purposes of referring towing calls. There was no township ordinance or regulation creating an independent source from which a property interest would stem. *Compare Leipziger v. Falls Township,* (2001WL 111611 (E.D.Pa.) (township ordinance establishing procedure for appointment to authorized towing list creates entitlement warranting procedural due process protections).

As to Allen's equal protection claim, Allen must show that it, compared to others similarly situated, was selectively treated and that the treatment was motivated by an intent to discriminate on the basis of impermissible considerations, such as race or religion, to punish the exercise of constitutional rights, or a malicious or bad faith intent to injure. *Homan v. City of Reading*, 15 F. Supp. 2d 696 (E.D. Pa. 1998). Since Allen's claim does not implicate the deprivation of a fundamental right or discrimination based on a suspect class, the municipal action is to be evaluated under a rational relationship test. *Larsen v. Senate of the Commonwealth of Pennsylvania*, 955 F. Supp. 1549 (M.D. Pa. 1997). Allen's removal from the police department towing list was occasioned by nothing other than failure to comply with township ordinances. Moreover, the police department established designated towing zones within the township by general order while Allen was suspended from the towing agency list. There is no showing, in this record, of the requisite "manifest intentional

discrimination or…irrational class distinction" in those actions. *Envirotech*, 745 F. Supp. at 281.

We therefore affirm the trial court order granting the defendants' motion for summary judgment.

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JAMES GARDNER COLINS, Senior Judge

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O R D E R

AND NOW, this 13th day of February 2008, the order of the Court of Common Pleas of York County in the above-captioned matter, dated February 16, 2007, is hereby affirmed.

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JAMES GARDNER COLINS, Senior Judge