

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 9, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP2192

Cir. Ct. No. 2006CV139

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

VILLA ITALIAN PIZZA RESTAURANT OF MUSKEGO, LLC,

PLAINTIFF-RESPONDENT,

v.

LALICATA WOODS LLC, GIUSEPPE LALICATA, AND MARLENE LALICATA,

DEFENDANTS,

CITY OF MUSKEGO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
MARK S. GEMPELER, Judge. *Reversed and cause remanded.*

Before Brown, C.J., Nettesheim¹ and Snyder, JJ.

¶1 PER CURIAM. The City of Muskego has appealed from a trial court order denying its motion to dismiss an amended complaint filed against it by Villa Italian Pizza Restaurant of Muskego, LLC (Villa).² In its amended complaint, Villa challenged the City's denial of its application for a liquor license, demanding relief under 42 U.S.C. § 1983. The City moved to dismiss the amended complaint for failure to state a claim upon which relief could be granted. It contended that it was entitled to dismissal of Villa's § 1983 action because constitutional claims cannot be prosecuted until state law remedies are proven unavailable or inadequate. It contended that Villa had failed to exhaust its state court remedy by seeking judicial review of the license denial under WIS. STAT. § 125.12(2)(d)(2005-06).³

¶2 The trial court denied the motion.⁴ In its oral ruling, it determined that seeking review under WIS. STAT. § 125.12(2)(d) was permissive, and that failure to do so did not bar Villa's 42 U.S.C. § 1983 action.⁵

¹ Although this opinion is released after the effective date of Judge Nettesheim's resignation, all substantive work on this case was completed prior to that date.

² Villa has also sued LaLicata Woods LLC, and Giuseppe and Marlene LaLicata, alleging breach of contract, misrepresentation, and interference with business relations. The LaLicatas and LaLicata Woods are not parties to this appeal, and the action against them remains pending.

³ All references to the Wisconsin Statutes are to the 2005-06 version.

⁴ Although the written order denying the motion was signed by Waukesha County Circuit Court Judge Mark S. Gempeler, the oral ruling upon which this appeal is premised was made by Reserve Judge Richard Becker.

⁵ We granted the City's petition for leave to appeal the trial court's order on December 14, 2006.

¶3 We reverse the trial court's order denying the motion to dismiss. A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint. *Wausau Tile, Inc. v. County Concrete Corp.*, 226 Wis. 2d 235, 245, 593 N.W.2d 445 (1999). Whether the complaint is legally sufficient to state a claim for relief is a question of law which we review de novo. *Thorp v. Town of Lebanon*, 2000 WI 60, ¶35, 235 Wis. 2d 610, 612 N.W.2d 59. On review, we accept as true the facts alleged in the complaint, and the reasonable inferences that may be drawn from them. *Id.* Dismissal of the complaint is improper unless no relief could be granted under any set of facts that the plaintiff could prove. *Wausau Tile*, 226 Wis. 2d at 245.

¶4 According to the complaint, Villa is a limited liability corporation whose sole member is Piero Collura. In its complaint, Villa alleged that on or about July 29, 2005, Villa purchased all of the assets and goodwill for a pizza business located in a building owned by Giuseppe and Marlene LaLicata. Villa further alleged that the purchase was dependent upon the LaLicatas' representation that they would enter into a long-term lease with Villa for the continued operation of the pizza business. Villa also alleged that the prior operator of the pizza business at this site had operated under a lease with the LaLicatas for more than fifteen years, and had at all relevant times held a Class B liquor license issued by the City.

¶5 Villa alleged that on November 1, 2005, it submitted an application for a Class B liquor license to the City. It alleged that the Finance Committee held a hearing and recommended denial of the license on November 16, 2005. It alleged that the Common Council of the City denied the application on November

22, 2005 based on the reasons provided by the Finance Committee. It alleged that the LaLicata Woods⁶ submitted an application for a Class B liquor license on or about December 5, 2005 for the same location. According to the complaint, the license was issued to LaLicata Woods on December 14, 2005, after a hearing and recommendation of approval by the Finance Committee, and approval by the Common Council.

¶6 In its amended complaint, Villa alleged that the actions of the City, acting under color of state law as defined in 42 U.S.C. § 1983, constituted discrimination and deprived it of due process and equal protection. In support of its claims, Villa alleged that the Finance Committee recommended denial of its liquor license application based upon the recommendation of the police chief for the City, who had recommended denial of the license in a memorandum dated November 8, 2005. In its amended complaint, Villa alleged that the police chief's recommendation was based on unsubstantiated concerns which Villa described as follows:

1. "The application dated 11-01-05 on line #9 contains too broad of a description of the area where alcohol will be sold." As to this item the Chief expressed his personal opinion that the omission of the information from the original application was not a mistake but deliberately done by Villa Italian for the purpose of Villa Italian expanding the sales of liquor in other parts of the building.
2. The Chief's personal belief that the father of the sole member of the limited liability company making the application, Guiseppe Collura, was a "business partner" of the applicant and that business would be conducted illegally in the future.

⁶ Villa alleged that LaLicata Woods was formed effective November 21, 2005, and that its members are Giuseppe and Marlene LaLicata.

3. That the application should be denied due to actions and conduct of Guiseppe Collura and a business owned by this individual in Rockford, Illinois. By association the Chief implicated the applicant for the conduct of a person unrelated to the ownership or operation of the applicant's business.
4. The Chief expressed his opinion and belief that Piero Collura, son of Guiseppe, applied for the license in Muskego so that his father, Guiseppe, whose name was on the license in Illinois, would not be challenged as an applicant based on his past record. The Chief further stated his belief that "Piero and Guiseppe are in family partnership when they operated the Flag and continued to be in a family partnership in attempting to license the Villa Italian Pizza of Muskego."

¶7 In its amended complaint, Villa alleged that the allegations by the Chief were unsubstantiated and not supported by evidence and unduly influenced an impartial review of its application. Villa alleged that based upon the Chief's recommendations, the Finance Committee recommended denial of the application based on the "adverse impact on the peace, quiet and cleanliness of the neighborhood where the establishment is located."

¶8 In seeking relief against the City, Villa alleged that the City's decision to deny its application for a liquor license was arbitrary, capricious, and without a rational basis, based upon the imputation of the conduct and background of Guiseppe Collura, a person not associated with the Villa application. It also contended that Villa's application was subjected to a higher level of scrutiny than that imposed on LaLicata Woods, and that the City failed to apply the same factors to its application and the application of LaLicata Woods, even though their applications were substantially similar in content, nature, scope and completeness, and applied to the same location. It contended that the "official acts of discrimination by the City of Muskego, the violations of Villa Italian's due process and equal protection rights," and the denial of its liquor license

application, caused it to incur losses and damages. Additionally, it demanded that the City grant a Class B liquor license for its restaurant, and revoke the license issued to LaLicata Woods.

¶9 We conclude that the allegations set forth in Villa's amended complaint are insufficient to state a claim for relief under 42 U.S.C. § 1983.⁷ By itself, § 1983 does not create any substantive constitutional rights. *Penterman v. Wisconsin Elec. Power Co.*, 211 Wis. 2d 458, 472, 565 N.W.2d 521 (1997). Rather, it provides a remedy for the deprivation of such rights. *Id.* To state a claim under § 1983, a plaintiff must allege that the conduct complained of was committed by one acting under color of state law, and that the conduct deprived the plaintiff of rights, privileges or immunities secured by federal law or the U.S. Constitution. *See Jones v. Dane County*, 195 Wis. 2d 892, 912, 537 N.W.2d 74 (Ct. App. 1995).

¶10 Villa's amended complaint alleges that its liquor license application was substantially similar to LaLicata's, and that its application was denied based on unsubstantiated rumor and claims that Guiseppe Collura had a controlling or significant interest in the business operated by his son, Piero. It is these allegations that underlie Villa's claims that the City engaged in discrimination and violated its rights to due process and equal protection. We conclude that they are inadequate to state a claim.

⁷ We recognize that we are addressing the issue of whether Villa's amended complaint states a claim upon which relief can be granted differently than the trial court, which addressed the City's exhaustion of remedies argument. However, we have authority to raise questions of law sua sponte, and do so here. *Bartus v. DH&SS*, 176 Wis. 2d 1063, 1071, 501 N.W.2d 419 (1993).

¶11 Under the equal protection clause of the Fourteenth Amendment, a state must treat all similarly situated people alike. *Penterman*, 211 Wis. 2d at 483. An equal protection claim may arise from intentional discrimination based on membership in a particular class or group. *Id.* However, because Villa’s complaint does not allege discrimination based on membership in any particular class or group, like an ethnic or racial class, this type of equal protection claim is not raised.

¶12 A “class of one” equal protection claim has also been permitted where the plaintiff alleges that he has been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment, or the cause of the differential treatment is a totally illegitimate animus toward the plaintiff by the defendant. *McDonald v. Village of Winnetka*, 371 F.3d 992, 1001 (7th Cir. 2004). To be similarly situated, comparators must be prima facie identical in all relevant respects. *Id.* at 1002. “The reason that there is a ‘similarly situated’ requirement in the first place is that at their heart, equal protection claims, even ‘class of one’ claims, are basically claims of discrimination.” *Id.* at 1009.

¶13 Villa did not allege an illegitimate animus toward its business. Moreover, the facts as alleged in Villa’s amended complaint fail to support a conclusion that Villa was intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. According to the complaint, the Finance Committee and Common Council denied Villa’s application based on “the adverse impact on the peace, quiet and cleanliness of the neighborhood where the establishment is located.” While Villa compares itself to the LaLicatas and LaLicata Woods in contending that the denial violated its equal protection rights, the allegations of the amended complaint

indicate that Villa is a new applicant for a liquor license from the City, while the LaLicata defendants are alleged to be long-time owners of the building where the liquor license was to be used, and where a liquor license has been used in the past. Moreover, the amended complaint alleges that the Finance Committee and Common Council were provided with information regarding Guiseppe Collura's background and involvement in his son's business that negatively impacted Villa's application. No such facts are alleged regarding the LaLicatas or LaLicata Woods. The allegations of the complaint therefore do not provide a basis for finding that Villa was treated differently than others similarly situated.

¶14 In addition to failing to state a claim based on an equal protection violation, Villa's amended complaint fails to set forth a claim for a due process violation. To establish a substantive due process claim, a plaintiff must demonstrate that it has been deprived of a liberty or property interest that is constitutionally protected. *Thorp*, 235 Wis. 2d 610, ¶46. A property interest is constitutionally protected if state law recognizes it and protects it. *Id.*

¶15 There is no right to a liquor license and the ultimate question of whether to issue such a license to a particular applicant is a matter of local concern. *State ex rel. Smith v. City of Oak Creek*, 139 Wis. 2d 788, 801, 407 N.W.2d 901 (1987). Consequently, the City's denial of a liquor license, without more, does not give rise to a substantive due process violation.

¶16 Villa's amended complaint also fails to state a claim based on a procedural due process violation. The procedural due process clause protects individuals from governmental denial of fundamental procedural fairness. *Thorp*, 235 Wis. 2d 610, ¶53. Procedural due process does not prevent governmental entities from depriving persons of life, liberty or property. *Jones*, 195 Wis. 2d at

914. What is unconstitutional is the deprivation of a protected right without due process of law. *Id.* “In other words, the constitutional violation is not complete when the deprivation occurs, but when the state fails to provide due process.” *Id.* Procedural due process is satisfied if the state provides adequate post-deprivation remedies. *Thorp*, 235 Wis. 2d 610, ¶53.

¶17 To the extent Villa’s amended complaint alleges that the City violated its procedural due process rights by acting arbitrarily, capriciously, and without a rational basis when it denied its application based on unsubstantiated claims, the alleged violation is not complete for purposes of bringing a 42 U.S.C. § 1983 action. An applicant for a liquor license who believes the municipality acted arbitrarily, capriciously and without a rational basis in denying its application may obtain review of that issue under WIS. STAT. § 125.12(2)(d). *See State ex rel. Ruffalo v. Common Council*, 38 Wis. 2d 518, 525, 157 N.W.2d 568 (1968). Villa’s amended complaint therefore fails to state a claim under 42 U.S.C. § 1983 based upon a procedural due process violation. Accordingly, we reverse the trial court’s order denying the City’s motion to dismiss, and remand the matter to the trial court with directions to enter an order dismissing the amended complaint as to the City.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

