COURT OF APPEALS
DECISION
DATED AND FILED

May 13, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1110

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

DAVID R. BARNES,

PLAINTIFF-APPELLANT,

V.

THE TOWN OF MT. PLEASANT, RON MEYER, DON HALLOWELL AND KOREGIS GROUP,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Racine County: STEPHEN A. SIMANEK, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. David R. Barnes appeals from a judgment dismissing that portion of his complaint alleging that Don Hallowell and Ron Meyer, employees of the Town of Mt. Pleasant (hereinafter, Town), violated his rights contrary to 42 U.S.C. § 1983. We conclude that Barnes has not identified a particular constitutional right that has been trampled by the alleged

conduct of Hallowell and Meyer. We affirm the summary judgment dismissing his § 1983 claims.

In 1992, Joan Korb and Frederic Will began discussions with the Town for the development of the Woodlake Subdivision on property they owned within the town limits. In November 1992, Don Hallowell, Public Works Director, requested that the storm sewer plan be revised to include an extension to provide proper drainage from adjacent property. Korb and Will believed that the Town would reimburse them for the extra storm sewer cost associated with the extension because the extension saved the Town money in remedying drainage problems on the adjacent property.

The final subdivision plat was approved by the town board on March 22, 1993. By a letter of May 11, 1993, Barnes informed Hallowell that the parties wanted to begin construction but that the subdivider's agreement with the Town needed to be executed.[1] The letter indicated that all issues pertinent to the agreement were resolved except for "the amount we should recover for the increase[d] cost of storm sewer work requested by the Town of Mt. Pleasant to take care of Town drainage in areas outside of Woodlake Subdivision, and matters related to paving." Barnes stated that the excess storm sewer cost was $27,448.50.

By a letter of May 27, 1993, Barnes was informed by Hallowell that the request for reimbursement for the extra storm sewer cost was denied. The subdivider's agreement with the Town was signed by Korb and Will on June 1,

[1] In April 1993, Barnes had agreed to buy the property and complete the development. The purchase was not completed until January 31, 1994, at which time Barnes obtained an assignment from Korb and Will of any right they had to reimbursement of the extra storm sewer cost.

1993. No provision for reimbursement for the extra storm sewer cost was made in the agreement.

Barnes pursued a claim for reimbursement for the extra storm sewer cost with the town board. At a public meeting held on September 20, 1993, the town board denied the request for reimbursement.

On June 16 and July 1, 1994, Barnes wrote the town chairman and board members indicating that the Town had breached its agreement to install paving, curb and gutter in the subdivision. The letters suggested that Town employees, Hallowell and Ron Meyer, Development Coordinator, were "blackmailing" Barnes by refusing to authorize paving in the subdivision until Barnes made a written waiver of his claim for reimbursement for extra storm sewer cost. Barnes received a letter from the Town chairman indicating that paving had not been done in the subdivision because the Town was behind on paving funds.

In October 1994, Barnes filed this action seeking reimbursement for the extra storm sewer cost and damages for the Town's wrongful refusal to provide paving in the subdivision. The action was dismissed with prejudice upon the stipulation of the parties in November 1994. In September 1995, Barnes filed a motion under § 806.07, STATS., to vacate the stipulation of dismissal on the grounds that he entered into the stipulation by mistake, due to economic duress

caused by the Town, and on account of misrepresentations and misconduct by the Town.[2] The motion to reopen was granted.

Barnes filed an amended complaint which realleged his claims against the Town for reimbursement and damages caused by delayed paving. In counts V through VIII, Barnes alleged that Hallowell, Meyer and the Town violated his right to due process and that he was entitled to damages and attorney's fees under 42 U.S.C. § 1983. The trial court granted partial summary judgment dismissing counts V through VIII.

When reviewing a trial court's grant of summary judgment, we apply the standards set forth in § 802.08, STATS. *See* ***Menick v. City of Menasha***, 200 Wis.2d 737, 742, 547 N.W.2d 778, 780 (Ct. App. 1996). The first step requires us to examine the pleadings to determine whether a claim for relief has been stated. *See* ***Crowbridge v. Village of Egg Harbor***, 179 Wis.2d 565, 568, 508 N.W.2d 15, 17 (Ct. App. 1993). If so, the inquiry shifts to whether any factual issues exist. *See* ***id.*** Our review is de novo. *See* ***Menick***, 200 Wis.2d at 742, 547 N.W.2d at 780.

The complaint alleges that in the fall of 1993, Hallowell told Barnes that if the claim for storm sewer reimbursement was not dropped, the Town would not complete the roads in the subdivision and Barnes would never have another development in the town approved. The complaint also alleges that in June 1994, Meyer made similar comments about the need for Barnes to drop his storm sewer

[2] The motion indicated that in November 1994, a settlement agreement had been made entitling the Town to $8100 of funds in escrow and obligating the Town to immediately complete curb, gutters and initial paving in the subdivision. The motion alleged that ten months had passed and the site work remained undone.

reimbursement claim in order to get the roads put in the subdivision and gain approval of any future town developments. The complaint quotes Hallowell and Meyer as each having uttered a single expletive in making these statements. It alleges that the statements of Hallowell and Meyer constitute an abuse of governmental power, an ultra-vires act, negligent, willful, wanton and reckless conduct, and a denial of due process guaranteed under the Fourteenth Amendment. The expressions of the Town's refusal to afford Barnes his legal rights are alleged to have caused injury, which includes a delay in the completion of his subdivision, delayed lot sales, additional taxes and insurance, and the loss of interest on money invested in the subdivision. The complaint further alleges that Barnes may wish to develop real estate in the town in the future, and if Hallowell and the Town "act as promised, [Barnes] will, in the future, be denied his rights under the ordinances of the Town of Mt. Pleasant, ordinances of the County of Racine, and laws of the State of Wisconsin and will be damaged thereby."

To state a cause of action under 42 U.S.C. § 1983, a party must allege that a person acting under the color of state law acted in a manner which deprived the party of rights protected by the Constitution or laws of the United States. *See* ***Penterman v. Wisconsin Elec. Power Co***., 211 Wis.2d 458, 472, 565 N.W.2d 521, 530 (1997). Barnes does not particularize the constitutional basis for

his claim.[3] He only makes conclusory statements in his complaint that his right to substantive due process has been violated.[4] "In evaluating a substantive due process claim, the threshold inquiry is whether the plaintiff shows a deprivation of a liberty or property interest protected by the Constitution." ***Id.*** at 480, 565 N.W.2d at 533.

At best, Barnes alleges that Hallowell and Meyer were rude to him.[5] He does not allege an actual deprivation as a consequence of the rude statements. Barnes was not prevented from pursuing efforts to compel the Town to comply with its contractual obligation. As to the claim that he has been injured by delay

[3] We do not necessarily agree with the trial court's determination that substantive due process protects only a narrow field of core interests relating to "marriage, family, procreation and right to bodily integrity." The Due Process Clause has a substantive component that bars arbitrary governmental action. *See* ***Vorwald v. River Falls Sch. Dist.***, 160 Wis.2d 536, 540, 466 N.W.2d 683, 685 (Ct. App. 1991), *rev'd on other grounds*, 167 Wis.2d 549, 482 N.W.2d 93 (1992). *See also* ***Penterman v. Wisconsin Elec. Power Co***., 211 Wis.2d 458, 480 n.10, 565 N.W.2d 521, 533 (1997) (while substantive due process protection has traditionally been afforded to liberty interests, such as marriage, family, procreation and bodily integrity, it does not mean that the right to enjoy and use personal property is not subject to constitutional protection). Any violation actionable as a substantive due process claim is complete when the violation occurs; state law remedies do not preclude a plaintiff from bringing a 42 U.S.C. § 1983 action based on such violations. *See* ***Vorwald***, 160 Wis.2d at 540, 466 N.W.2d at 685.

[4] In examining whether a complaint states a claim, "'legal conclusions and unreasonable inferences need not be accepted.'" ***Bartley v. Thompson***, 198 Wis.2d 323, 332, 542 N.W.2d 227, 230 (Ct. App. 1995) (quoted source omitted), *cert. denied*, 517 U.S. 1210 (1996). Barnes did not offer any evidence in opposition to the motion for summary judgment with respect to his 42 U.S.C. § 1983 claims.

[5] We reject the contention that Barnes failed his evidentiary burden to avoid summary judgment when he failed to provide admissible testimony that Hallowell and Meyer made the statements alleged. It is obvious from the record that a dispute of fact exists as to whether the statements were made. Although that dispute cannot be resolved on summary judgment, s*ee* ***State Bank of Independence v. Equity Livestock Auction Mkt.***, 141 Wis.2d 776, 784, 417 N.W.2d 32, 35 (Ct. App. 1987) (on summary judgment a trial court is not entitled to weigh conflicting evidence as it would at a trial), it does not preclude summary judgment in this instance where dismissal is proper even assuming that the statements were made, *see* ***Clay v. Horton Mfg. Co.***, 172 Wis.2d 349, 353-54, 493 N.W.2d 379, 381-82 (Ct. App. 1992)(the alleged factual dispute must concern a fact that affects the resolution of the controversy).

in completion of the roads in the subdivision, it was the Town's failure to act and not the mere expression that the Town would not act which caused the potential deprivation. *Cf.* ***Penterman***, 211 Wis.2d at 482, 565 N.W.2d at 534 (conduct which merely causes the continuation of a property loss is not a violation of the right to substantive due process). That claim will be redressed in Barnes' claims against the Town which have yet to be litigated.

Barnes argues that his right to develop future projects in the town has been violated. A 42 U.S.C. § 1983 action will not lie with regard to rights or conduct that may occur in the future. Barnes' claim is not yet ripe. *See* ***Streff v. Town of Delafield***, 190 Wis.2d 348, 350-51, 526 N.W.2d 822, 823 (Ct. App. 1994). Barnes would not be entitled to compensation for something that has not yet occurred.

By the Court.—Judgment affirmed.

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