FOURTH JUDICIAL CIRCUIT OF VIRGINIA
CIRCUIT COURT OF THE CITY OF NORFOLK

COPY

JUNIUS P. FULTON III
JUDGE

June 25, 2009

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CMS

FILED
2009 JUN 25 PM 4:17
NORFOLK CIRCUIT COURT CLERK
BY:_____D.C.

Re: Joseph C. Lee v. City of Norfolk
Case No.: CL08-393

Dear Counsel:

As you know, this matter came before the Court on May 27, 2009 for argument on pleas in bar filed by the City. The Court sustained the plea in bar to Count III of the Plaintiff's Third Amended Motion for Judgment and reserved ruling on the remaining plea in bar to allow an opportunity to consider the applicable case law, the argument of counsel, and the undisputed facts.

The undisputed facts in this case are that Lee received notice by certified mail on September 20, 2006 that his property located at 221 Ethel Avenue, Norfolk, Virginia was deemed unsafe by the City and pursuant to its police powers was ordered demolished. This notice also gave Lee 21 days to file an appeal to the local board of building code appeals. For the next several months, Lee attempted to work with the City in order to come into compliance, but at no time did he file an appeal. On December 19, 2006 the City sent another letter "as a continuum of the certified letter dated September 12, 2006" notifying Lee that all extensions had expired and the City would be demolishing the structure pursuant to the emergency provisions of the USBC. The City demolished the structure 17 days later, and this suit followed.

Lee argues that after the September 12th letter and prior to the December 19th letter he and the City held discussions and exchanged correspondence which constituted an "extension" and that his right to appeal was not triggered until the City's December 19th letter. Further, that under the circumstances of his case he was entitled to a 90 days (and not 21 days as the City asserted in the September 12th letter) to appeal a determination that his property was unsafe. Consequently, he argues argues his right to appeal would have commenced on December 19, 2006 and not September 12, 2006.

§118.5 of the USBC deals with emergency demolitions and provides that "whenever an owner of an unsafe building or structure fails to comply with a notice to demolish issued under §118.3 and the time period stipulated, the building official shall be permitted to cause the unsafe building or structure to be demolished." §119.5 of the USBC provides however, that "the applicant shall submit a written request for appeal to the LBBCA within 90 calendar days of the receipt of the decision being appealed." The September letter represented the notice to demolish under §118.3 and it stipulated the time period in which the building needed to be demolished and gave a 21 day time period during which Lee could appeal the unsafe designation.

The USBC provides the City with the authority to exercise its police power where a condition has the effect of creating a public nuisance. The abatement of a nuisance often requires prompt and summary proceedings, and where the abatement is authorized under the police power of the state and due process of law has been observed, the owner of the property destroyed for the public good has no constitutional right beyond those provided in the statute under which the abatement is made. Stickley v. Givens, 176 Va. 548, 562 (1940). In this case, Lee's due process rights were safeguarded by the opportunity to appeal the decision of the City that his property constituted a public nuisance. Regardless of which time period would be controlling, 21 or 90 days, the house was demolished more than 90 days following the September letter.

Lee contends that meetings he attended with City officials and correspondence between he, the City and engineers acting on his behalf constituted an extension. The City argues that the post-September 12, 2006 discussions was merely an effort by the City to work with Lee as a property owner to prevent demolition of his property but not in any way a reconsideration of whether 221 Ethel Avenue constituted a public nuisance and was thus subject to abatement. The City further argues that Lee by virtue of not ever appealing its decision has failed to exhaust the administrative remedies provided for under the USBC and he is thus barred from proceeding in this matter. As the question of whether 221 Ethel Avenue is in a dangerous and unsafe condition and constitutes a public nuisance is a "thing decided." Lee argues that the principle of failure to exhaust administrative remedies is not applied due to the discussions he had with the City regarding rectifying the problems identified by the City in declaring his property to be a public nuisance. The City argues that the meetings between Lee and its officials never touched upon the determination by the City that the property was dangerous and constituted a public nuisance, but remedial actions which could abate the nuisance short of demolition. By failing to exhaust his administrative remedies as prescribed by the Virginia General Assembly, Lee is precluded from having this Court decide whether the building was unsafe and a threat to public safety. Consistent with this Court's decision in Family Home Services, Inc. v. City of Norfolk, 72 Va. Cir. 320 (2006) and Boone v. City of Norfolk, L03-594 (2003), the City's plea in bar will be sustained; Mr. Melita will prepare an Order consistent with the foregoing.

Sincerely,

Junius P. Fulton, III
Judge

JPFiii/mls

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

JOSEPH C. LEE,	:	
Plaintiff,	:	
v.	:	AT LAW NO: CL08-393
CITY OF NORFOLK,	:	
Defendant.	:	

ORDER

This 27th day of May, 2009, came the Plaintiff and the Defendant, by counsel, and, upon special pleas in bar filed by the Defendant and argument presented, it is hereby

ADJUDGED, ORDERED and DECREED that

1. For the reasons stated in the record of this case, the pleas in bar are granted; and

2. The claims made in Counts Two and Three of Plaintiff's Complaint, as amended, are dismissed.

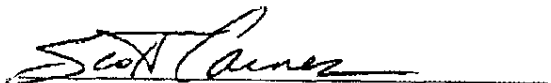
ENTERED: 7-5-09

Hon. Junius P. Fulton, III

Date

CM
SC

Seen and Objected to:



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VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

JOSEPH C. LEE,

Plaintiff,

v. AT LAW NO: CL08-393

CITY OF NORFOLK,

Defendant.

FINAL ORDER

THIS ACTION came for decision on Defendant's Demurrer to Count I of Plaintiff's Second Amended Complaint, and was argued by counsel; whereupon, for good cause shown and for the reasons stated in the Court's July 30, 2009, Opinion Letter to counsel, it is ORDERED that said Demurrer be and it is hereby overruled; whereupon, Plaintiff moved for a nonsuit as to Count I of the Second Amended Complaint, pursuant to statute as of right, no prior nonsuit having been taken in this action, it is further ORDERED that Plaintiff is hereby granted a nonsuit as to said Count I of the Second Amended Complaint;

WHEREUPON the Court having previously dismissed Plaintiff's due process and all other claims asserted by Plaintiff in this action, all over the objection of the Plaintiff duly noted, it is ORDERED that final judgment be and it is hereby granted for Defendant, and this action is dismissed.

CM
SC

ENTERED:

Judge

Julius P. Fulton, III, Judge

8-24-09

Date

Seen:

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Seen and objected to with respect to all rulings of the Court dismissing claims asserted in Plaintiff's Complaint, Amended Complaint and Second Amended Complaint:

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ASSIGNMENTS OF ERROR

1. The trial court erred in dismissing Lee's due process claim.

2. The trial court erred in dismissing Lee's inverse condemnation claim.

3. The trial court erred in dismissing Lee's property damage claim.