IN THE

Supreme Court of Virginia

RECORD NO. 092385

JOSEPH C. LEE,

Appellant,

v.

CITY OF NORFOLK,

Appellee.

OPENING BRIEF OF APPELLANT

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NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Lee filed this action on January 22, 2008, seeking to recover from the City for the wrongful demolition of his property, a residential duplex structure undergoing repairs for which Lee had obtained building permits. Lee alleged that the City violated his due process and equal protection rights, and that he is entitled to recover damages under inverse condemnation and common law property damage theories. (App. 1-4).

Over Lee's objection the trial court sustained the City's Demurrer to the original Complaint (App. 56-7), and Lee filed his Amended Complaint on September 16, 2008 (App. 58-69). The Amended Complaint expanded the specific factual allegations, setting forth in detail the chronology of events leading to the City's demolition of Lee's property and the deficiencies in the City's notice and procedure. The City filed a Demurrer to the Amended Complaint (App. 75-7); the trial court overruled the Demurrer as to Lee's inverse condemnation claim (Count Two), sustained the Demurrer as to his equal protection claim asserted under Count One with leave to amend, and by letter opinion dated February 6, 2009, the trial court sustained the City's Demurrer to Lee's due process claim under

Count One without leave to amend (App. 99-100; 78-9). Lee filed a Second Amended Complaint on February 13, 2009 (App. 80-91).

Thereafter, at a hearing on May 27, 2009, the trial court granted the City's Pleas in Bar to Lee's property damage claim (Count Three), and by letter opinion dated June 25, 2009, the trial court granted the City's Plea in Bar to Lee's inverse condemnation claim (Count Two) (App. 129-131). Left with only his equal protection claim remaining for adjudication, Lee non-suited that claim and a final order dismissing all other claims over Lee's objection was entered on August 24, 2009 (App. 133-4).

Lee timely filed his Notice of Appeal on September 11, 2009, and this appeal was awarded by Order entered April 19, 2010. Lee respectfully seeks reversal of the trial court's rulings dismissing his due process, inverse condemnation and property damage claims.

ASSIGNMENTS OF ERROR

1. The trial court erred in dismissing Lee's due process claim. (preserved at App. 99-100; 133-4)
2. The trial court erred in dismissing Lee's inverse condemnation claim. (preserved at App. 131-4)

3. The trial court erred in dismissing Lee's property damage claim. (preserved at App. 131-4)

QUESTIONS PRESENTED

1. Did the trial court err in dismissing Lee's due process claim? (Assignment of Error 1).
2. Did the trial court err in dismissing Lee's inverse condemnation claim? (Assignment of Error 2).
3. Did the trial court err in dismissing Lee's property damage claim? (Assignment of Error 3).

STATEMENT OF FACTS

This case arises from the City of Norfolk's wrongful demolition of Appellant Joseph C. Lee's brick duplex, a rental property located at 221 Ethel Avenue, Norfolk, VA, on January 5, 2007, without proper notice and an opportunity to be heard.

Lee was doing repair and renovation work to the property as a result of an accidental fire caused by a tenant. Lee obtained the proper building permits on two separate occasions for the work. The initial work was permitted on June 2, 2006, and revisions allowing the

structure to be elevated out of the flood plain were later permitted on August 26, 2006. Contractors hired by Lee worked throughout that summer of 2006 under those permits and were paid for those repairs and renovations. (App. 81, 2nd Amended Complaint ¶¶4-6)

While these repairs were ongoing, on or about September 5, 2006, Occupancy Inspector Masten, an employee of the City of Norfolk, visited and inspected the property. The following day, September 6, 2006, Lee received a telephone call from Ms. Tracy Hayes, Sr. Code Specialist, Demolition/Nuisance Abatement, another City employee, who falsely asserted that Lee's permits had been revoked because he had "exceeded the 50% rule" (which limits repairs to non-conforming structures, such as Lee's duplex, to 50% of the value of the structure). Hayes visited the site the same day, and Lee requested that she provide him a written statement explaining the reason the permits had been revoked. No such statement was ever forthcoming; neither was Lee ever notified in writing that the building permits had, in fact, been revoked. (App. 81-2, 2nd Amended Complaint ¶¶7-8)

On September 12, 2006, the Acting Chief of the Division of Neighborhood Preservation, James A. Rogers, stated in a letter to

Lee that the property "...was inspected and found to be open, providing a haven for undesirable & criminal activities." He further stated **that "THE STRUCTURE HAS BEEN RENDERED UNSAFE BY ATTEMPTED REPAIRS,"** and was "in violation of the health and safety regulations of Section 130.0 of the Virginia Uniform Statewide Building Code ("USBC") and Article 1, Chapter 27, Section 27-6 of the Code of the City of Norfolk. Therefore, it has been declared **UNSAFE AND A PUBLIC NUISANCE**." The letter instructed Lee to demolish his building by September 27, 2006, or to contact Mr. Rogers if there were sound reasons why that deadline could not be met or if he was not in agreement with the interpretation or application of the code. The letter further advised that Lee could appeal the decision "...pursuant to Section 106.5 of the USBC." Lee was invited to contact Clark Ray, Nuisance Abatement Team Leader, if he had questions. (App. 82, 2nd Amended Complaint ¶9; App. 172)

This September 12, 2006 letter contained gross citation errors to inapplicable and non-existent provisions of law and Lee's appeal rights, and omitted required elements of proper notice under §15.2-906 of the Code of Virginia, 1950, as amended, and the applicable part of the Uniform Statewide Building Code ("USBC"), §118.3 of the

Virginia Construction Code, 2003 Edition. No notice was sent to the lienholder, as is required under §15.2-906 of the Code of Virginia, 1950, as amended. Neither was notice ever published in a newspaper of general circulation once a week for two consecutive weeks, as is required under the same statute. This letter was not delivered in person to Lee as owner, nor did it contain a statement requiring the person receiving it to accept or reject the terms of the notice, as mandated by §118.3 of the Virginia Construction Code, 2003 Edition. (App. 82-3, 2nd Amended Complaint ¶¶10-13)

By September 15, 2006, the City of Norfolk had placarded the building, which caused all construction activity to cease. No stop work orders were ever issued to Lee. (App. 83, 2nd Amended Complaint ¶14)

Lee received the City's September 12, 2006 letter on September 20, 2006, and immediately retained counsel, Mr. Joel Weintraub, who contacted Mr. Rogers and made immediate arrangements for Lee and his counsel to meet with various city employees, including Assistant City Attorney Adam Melita, on September 27, 2006, to discuss the safety issues raised by the City. (App. 83, 2nd Amended Complaint ¶16)

At that September 27, 2006 meeting, Lee agreed to make certain changes requested by the City to alleviate their safety concerns, all of which were completed and paid for by October 6, 2006. At the City's request, Lee also engaged the services of a structural engineer, David Pratt, P.E., of Sinclair, Pratt & Cameron, P.C., to evaluate the subject property for structural concerns and safety issues; upon review of the plans and inspection of the building Pratt found no structural or safety concerns. In his written report to the City of Norfolk dated November 10, 2006, Pratt stated that the building was "not in danger of immediate collapse" and recommended re-issuance of the building permits so that work could continue on the building. (App. 83-4, 2nd Amended Complaint ¶¶17-20)

On November 14, 2006, Ms. Hayes began requesting additional items from Pratt, apparently questioning, without valid, sufficient or rational basis, Pratt's professional judgment and evaluation of the subject property. By December 13, 2006, Pratt had become so frustrated by the City's repeated requests for more information that he sent a letter to the City stating that he was not able to complete the work the City had requested due to his busy schedule. The next day, Lee hired another structural engineer, Waverly G. Hampton, P.E., of

McPherson Design Group, to complete the additional plans requested by the City, which Hampton provided to the City within a week's time. (App. 84-5, 2nd Amended Complaint ¶¶21-24)

On December 19, 2006, Mr. James Rogers, "by direction of the Code Official", wrote another letter to Lee stating that the extensions granted to Lee by the City had expired and no further extensions would be granted. It further stated that the City would "....be demolishing the structure under the emergency provisions of the Uniform Statewide Building Code". Rogers also stated that his letter served as a "continuum of the certified letter...dated September 12, 2006, declaring the structure UNSAFE AND A PUBLIC NUISANCE." (App. 85, 2nd Amended Complaint ¶25)

Various emails and telephone calls ensued from December 19, 2006 through January 5, 2007 between Lee and certain City employees in an effort to address the December 19, 2006 letter. Lee specifically informed the City that he was meeting with his structural engineer on January 5, 2007, to provide even more information the City requested. Nevertheless, the City wrongfully demolished Lee's property on that same day, January 5, 2007. (App. 85, 2nd Amended Complaint ¶¶26-27)

Thus, only 17 days after sending Lee notice that all previously granted extensions had expired and would not be renewed, the City wrongfully deprived Lee of his right to appeal under §15.2-906 of the Virginia Code and the applicable parts of the USBC, §119 of the Virginia Construction Code, by demolishing the subject property. (App. 85-6, 2nd Amended Complaint ¶28)

LAW, ARGUMENT & AUTHORITIES

Familiar principles govern review of the trial court's ruling against Lee's due process claim:

> The principles guiding our review of a trial court's judgment sustaining a demurrer are well-established. "The purpose of a demurrer is to determine whether a motion for judgment states a cause of action upon which the requested relief may be granted." *Tronfeld v. Nationwide Mut. Ins. Co.*, 272 Va. 709, 712, 636 S.E.2d 447, 449 (2006) (citing *Welding, Inc. v. Bland County Serv. Auth.*, 261 Va. 218, 226, 541 S.E.2d 909, 913 (2001)). "A demurrer tests the legal sufficiency of facts alleged in pleadings, not the strength of proof." *Glazebrook v. Board of Supervisors*, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003). Accordingly, we accept as true all properly pled facts and all inferences fairly drawn from those facts. *Id.* "Because the decision whether to grant a demurrer involves issues of law, we review the circuit court's judgment de novo." *Dreher v. Budget Rent-A-Car Sys.*, 272 Va. 390, 395, 634 S.E.2d 324, 326-27 (2006) (citing *Glazebrook*, 266 Va. at 554, 587 S.E.2d at 591).

Augusta Mutual Insurance Co. v. Mason, 274 Va. 199, 204, 645 S.E.2d 290, 293 (2007).

Similarly, in reviewing the trial court's decision granting the City's Pleas in Bar, as no evidence is taken in support of the Pleas the appellate court must rely solely on the pleadings, deeming all facts stated in the Complaint to be true. *Tomlin v. McKenzie,* 251 Va. 478, 480, 468 S.E.2d 882,884 (1996).

Taking the detailed factual allegations set out in Lee's Amended Complaint and Second Amended Complaint, and all reasonable inferences fairly drawn from those facts, to be true, it is clear that this case represents another instance in which a trial court has incorrectly short-circuited litigation pretrial, and has decided the dispute without permitting the parties to reach a trial on the merits. *Renner v. Stafford*, 245 Va. 351, 352, 429 S.E.2d 218, 219 (1993); *see also CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24, 431 S.E.2d 277, 279 (1993). The trial court's rulings have improperly deprived Lee of his day in court to assert his constitutionally protected property rights and deprived this Court of an opportunity to review a thoroughly developed record on appeal. *Seyfarth, Shaw, Fairweather & Geraldson v. Lake Fairfax Seven Ltd. Partnership*, 253 Va. 93, 95,

480 S.E.2d 471, 472 (1997). For the reasons stated below Lee respectfully asks that the judgment below be reversed and the case remanded for trial.

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

The trial court erred when it dismissed Lee's due process claim because the notice given to Lee by the City was defective, which resulted in Lee being denied his constitutionally protected right to proper notice and an opportunity to be heard and his rental duplex being totally demolished at the hands of the City of Norfolk. Lee was deprived of his property without due process because the City of Norfolk failed to properly follow the provisions of its own and the state's laws.

A property owner is entitled to judicial review when he is deprived of his property without due process, or where the provisions of the law have not been followed. *Stickley v. Givens*, 176 Va. 548, 562, 11 S.E.2d 631, 638 (1940); see also *Jacobs v College of William & Mary*, 495 F.Supp. 183, 188 (E.D.Va. 1980) (holding that the College's failure to follow its own rules implicated the Due Process

Clause for purposes of stating a "sufficient claim for relief under § 1983").

Taking all of the allegations in the Amended and Second Amended Complaints as true, it is clear Lee properly asserted that the City's destruction of his property constituted a deprivation of his right to due process of law. The facts as alleged by Lee show that the notice provided by the City was insufficient under the law. The September 12, 2006, notice letter from the City to Lee recites that the subject structure was found to be in violation of Section 130.0 of the USBC, yet there is no such code section. This notice letter references an appeal right pursuant to the provisions of the Virginia Maintenance Code; however, section 105.1 of the Maintenance Code specifically notes that, "Buildings or structures which become unsafe during construction are regulated under the *Virginia Construction Code*", *not* the Virginia Maintenance Code.

The Virginia Construction Code recites that it applies to rehabilitation (section 103.1) and to reconstruction, alteration or repair (section 103.5), contains section 118 which is specifically applicable to structures becoming unsafe during construction (stating in section 118.1 that this section applies to buildings such as Lee's "...for which

a construction permit has been issued..."), and provides for a 90 day appeal period (section 119.5). Moreover, section 118.3 of the Virginia Construction Code requires that an inspection report be prepared and filed in the records of the local building department, and provides that the owner must be notified in person if his building is determined to be unsafe, and such notice must contain "...a statement requiring the person receiving the notice to determine whether to accept or reject the terms of the notice." The City complied with none of these requirements.

Additionally, Va. Code §15.2-906 requires that notice be given to the owner *and lienholder*, and be published once a week for two successive weeks in a newspaper having general circulation in the locality before demolition by the city may occur. The City ignored these requirements of law as well. The result of the City's failure to comply with the above legal requirements was that Lee's duplex was torn down without proper notice and without an opportunity to be heard. A clearer deprivation of due process is difficult to imagine.

While the City argued, and the trial court agreed (see June 25, 2009, opinion letter), that the September 12, 2006, letter constituted sufficient notice, Lee respectfully submits that this so-called notice is

a nullity, given the numerous errors and deficiencies set forth above. (See *Glazebrook v. Board of Supervisors*, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003). Furthermore, the December 19, 2006 notice, which failed to cure any of the many deficiencies of the September 12, 2006 notice, reflects by its terms that the City had indeed granted Lee "extensions" of the conditions purportedly imposed by the prior notice letter. It is neither fair nor reasonable to suggest that the "extensions" did not extend the time for appeal, especially given that the September notice letter recited the wrong appeal period. The City clearly had "extended" imposition of the terms set forth in the September 12, 2006, letter; the December 19, 2006, letter constituted notice that the City's position, which had been the subject of discussion and adjustment during the interim months of "extension", was only then deemed final. The appeal period can only reasonably be said to have commenced on December 19, 2006, yet the City demolished the structure only 17 days later, depriving Lee of a meaningful right to appeal. Nevertheless, the September 12, 2006, "notice" was so legally deficient that it cannot properly be viewed as triggering a right to an appeal under section 119.5 of the Virginia Construction Code.

Additionally, the City stated that it demolished the building under the "emergency procedures of the Building Code" (App. 133), yet the structure was not demolished for three and a half months, which speaks volumes about the validity of the City's position that this was an "emergency" situation requiring immediate action in order to protect the public health and welfare. See *Burtnieks v. City of New York*, 716 F.2d 982 (1983).

The City argued and the trial court's February 6, 2009, opinion letter reflects the court's ruling that Lee's due process claim is somehow vitiated by the availability of the postdeprivation relief potentially afforded by inverse condemnation. This is error. The availability of a postdeprivation tort action does not generally provide due process; absence of a meaningful predeprivation remedy is generally constitutionally inadequate. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 102 S. Ct. 1148 (1982).

Due Process, within the meaning of the Federal Constitution, is a flexible concept that varies with the particular situation. *Zinermon v. Burch*, 494 U.S. 113, 127, 110 S. Ct. 975, 984 (1990).

> In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking.

Id at 132.

In this case, at a minimum the City must be required to allow Lee the requisite time for an appeal as provided by the Virginia Construction Code (after the "extensions" were deemed by the City to have expired). Nevertheless, the City proceeded to demolish the subject structure despite written inspection reports (provided by Lee at the City's request) from two licensed, qualified structural engineers stating the structure was not in danger of collapse. This was clearly an abuse of local government authority and power, and a violation of Lee's due process rights guaranteed under the Constitution of the United States and under the Virginia Constitution.

Reliance by the City and the trial court upon the decision in *Tri-County Paving, Inc. v. Ash County*, 281 F.3d 430 (4th Cir. 2002) is misplaced, as it is the City's failure to comply with legally established procedural requirements that is the gist of Lee's due process claim, not a substantive due process claim, as was the case in *Tri-County Paving*. The City's failure to comply with the legal requirements of applicable provisions of the Virginia Code and the U.S.B.C. constitutes the denial of Lee's due process rights. See, *Zinermon v.*

Burch, *supra*. Lee contends that he was deprived of due process as a result of the City's deviation from its own procedures and previous assurances.

> ...there persists in controlling decisions of the Supreme Court recognition that significant departures from stated procedures of government and even from isolated assurances by government officers which have induced reasonable and detrimental reliance may, if sufficiently unfair and prejudicial, constitute procedural due process violations, *see United States v. Caceres*, 440 U.S. 741, 752-53 & n. 15, 99 S. Ct. 1465, 1472 & n. 15, 59 L. Ed. 2d 733 (1979).

Jones v. Board of Governors, University, N.C., 704 F.2d 713, 717 (4th Cir. 1983).

Moreover, postdeprivation remedies do not satisfy the requirements of due process where, such as here, property loss is caused by government conduct pursuant to established state procedures. *Logan, supra*. The City never gave proper, legally sufficient notice to Lee in compliance with state statute and the Virginia Construction Code, and therefore no time for appeal ever began to run. Certainly no appeal period expired before the City tore down Lee's duplex, particularly given that by the City's own admission "extensions" had been granted for compliance with the requirements set forth in the purported notice. Lee was deprived of

his property without due process of law, and the trial court erred in dismissing Lee's §1983 due process claim.

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

The trial court ruled that Lee's inverse condemnation was barred for failure to exhaust administrative remedies, i.e., the right to appeal under the USBC (see June 25, 2009 opinion letter). For the reasons stated above, this ruling was error because, in the absence of proper notice, no appeal time can be triggered. Moreover, under the facts and circumstances of this case, it would be fundamentally unfair to require Lee to pursue an administrative appeal when he was allowed, indeed caused, by the City to believe that he was complying with the terms set by the City at the September 27, 2006 meeting which would eliminate the City's demand for demolition of the subject structure. Lee had, in fact, submitted to the City two reports from independent licensed structural engineers opining that the structure was not unsafe, and was engaged in the ongoing effort to comply with the City's ever-growing requests for additional information. Even if all of the many deficiencies of the September 12, 2006 purported notice are ignored, it is clear from the December 19, 2006 letter from

the City that any requirements stated in the prior letter had been "extended" such that any administrative appeal period began to run from December 19, not September 12 (see *Lilly v. Caroline County*, 259 Va. 291, 297, 526 S.E.2d 743, 746 (2000). Whether the proper 90 day appeal period under the Virginia Construction Code is applied, or the incorrect 21 day appeal period under the Virginia Maintenance Code referenced by the City is applied, Lee's appeal rights were improperly limited to 17 days.

As he was not afforded a meaningful right to appeal given the deficiencies of the purported notice letter, nor even after the City's December 19, 2006, notice that all agreements were off and all "extensions" expired, Lee cannot be held to have failed to exhaust his administrative remedy. Accordingly, the trial court erred in dismissing Count Two, Lee's inverse condemnation claim.

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

Lee properly stated a cause of action for negligent damage to his subject property in Count Three of the original Complaint, the Amended Complaint and the Second Amended Complaint. He specifically alleged compliance with Va. Code §15.2-209 in that

notice of his claim was given by letter dated May 2, 2007, receipt of which was acknowledged by the May 11, 2007, letter of Assistant City Attorney Adam Melita (App. 87, 2nd Amended Complaint, ¶¶31 and 32).

Furthermore, the sovereign is not immune from liability for wrongful damage to property caused by officials acting under color of state law; the City has no discretion to violate Lee's property rights. *Owen v. City of Independence*, 445 U.S. 622 (1980); *B.M.H. by C.B. v. School Bd. of City of Chesapeake, Va.*, 833 F. Supp. 560 (E.D. Va. 1993). Lee's common law action seeking recovery for the damage done to his property without just compensation is not barred by the doctrine of sovereign immunity. *Kitchen v. City of Newport News*, 275 Va. 378,392, 657 S.E.2d 132, 140 (2008).

Accordingly, the trial court erred in dismissing Count Three of the Complaint, the Amended Complaint and the Second Amended Complaint.

CONCLUSION

Significant departures from procedures and requirements of applicable state statutes and the provisions of the USBC, if

sufficiently unfair and prejudicial, constitute procedural due process violations. *Jones v. Board of Governors , supra* (citing *United States v. Caceres*, 440 U.S. 741, 752-53 & n. 15 (1979)). Here, the City's September 12, 2006, 'notice' was so inaccurate, infirm and deficient as to constitute no notice at all. The statutory requirements under §15.2-906 and the Virginia Construction Code, Section 118, for proper notice were not adhered to by the City. The citations to certain sections of the USBC were inaccurate; the required notice to the lienholder was not provided; the required publication in a newspaper was not accomplished; the required report and list of necessary repairs and the opportunity to accept or reject the terms of the notice was not provided to Lee. The City's purported notice was so lacking in compliance with the applicable legal requirements that it was a nullity.

Nevertheless, Lee complied with all of the City's requests in good faith. Lee hired a structural engineer to evaluate the safety of the building. That engineer reported to the City that the building was not in danger of collapse and not a safety hazard, yet the City, acting without valid, sufficient or rational basis, was not satisfied with this report of a qualified expert. Finally, after his good faith efforts to

comply with the City's many requests for more information bore only frustration, that engineer stated that his work schedule could no longer accommodate the desires of the City. Lee hired a second structural engineer the next day. That second engineer also stated that the building was not in imminent danger of collapse and was not a safety hazard. He provided even more plans and drawings to the City. But the City abruptly terminated discussion with Lee and his engineers and proceeded to demolish Lee's duplex, depriving him of an administrative appeal (App. 83-6, 2nd Amended Complaint, ¶¶18-28). Lee's pleadings plainly stated sufficient facts upon which the relief demanded can be granted. The trial court erred in dismissing Lee's due process, inverse condemnation and property damage claims.

Accordingly, Lee respectfully prays that the judgment below be reversed, and that the case be remanded for trial.

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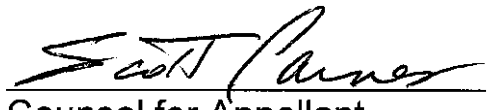
RULE 5:26(d) CERTIFICATE

The undersigned hereby certifies that Rule 5:26(d) has been complied with and the foregoing Opening Brief of Appellant was delivered to the Clerk of the Virginia Supreme Court this 28th day of May, 2010.



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