

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

PETER MACHLUP,	)	CASE NO.: 1:10-CV-00316
	)	
Plaintiff,	)	JUDGE DAN AARON POLSTER
	)	
vs.	)	<b><u>DEFENDANTS' MOTION TO DISMISS</u></b>
	)	
JEFF L. ASHBY, et al.,	)	
	)	
Defendants.	)	

Defendants Jeff L. Ashby and the City of Lakewood (collectively referred to as the “Lakewood Defendants”) respectfully request that this court dismiss this case pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, as the Plaintiff’s Complaint fails to state a claim upon which relief can be granted. A Memorandum in Support of this Motion follows.

**Memorandum in Support**

**I. Statement of Facts**

The Plaintiff has alleged the following facts, which, for the purposes of this Motion only, are presumed to be true:

On January 3, 2007 Plaintiff was deeded an interest in a piece of property located at 1570 Woodward Avenue in Lakewood, Ohio by Victoria Greenleaf. Complaint, ¶11. Plaintiff has not recorded his deed. *Id.* at ¶12. On March 24, 2009, the property was damaged in a fire. *Id.* at ¶13.

The property was declared a nuisance on October 19, 2009 by the City of Lakewood, and the City gave notice of intent to demolish the property. Plaintiff requested a review of the

declaration of public nuisance via certified mail on October 29, 2009. In response, Defendant Ashby, the Assistant Director of the Division of Building and Housing for the City of Lakewood, explained to Plaintiff the proper procedure to appeal such a decision, including filing a formal application, submitting certain notarized documents and submitting a \$25 filing fee. *Id.* at ¶18. Following an exchange of e-mails, Defendant Ashby informed Plaintiff that he could not accept Plaintiff's appeal because Plaintiff was not recognized as a registered stake holder on the property. *Id.* at ¶21.

Plaintiff filed suit alleging 1) violations of Plaintiff's right to due process, 2) violations of the takings clause of the Fifth Amendment, 3) a violation of the First Amendment Right to Redress Grievances, and 4) a *Monell* claim against the City of Lakewood. For the following reasons, all of Plaintiff's claims fail.

## **II. Law and Argument**

### **A. Standard of Review**

An action may be dismissed if the complaint fails to state a claim upon which relief can be granted. *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross and Blue Shield*, 552 F.3d 430, 434 (6<sup>th</sup> Cir., 2008), Fed. R. Civ. Pro. 12(b)(6). In ruling on a Rule 12(b)(6) motion to dismiss, the court must construe the complaint in favor of the plaintiff, accept the allegations of the complaint as true, and determine whether plaintiff's factual allegations present plausible claims. *Bowman v. U.S.*, 564 F.3d 765, 769 (6<sup>th</sup> Cir., 2008). To survive a motion to dismiss, the complaint must present "enough facts to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).

**B. Plaintiff has failed to state a claim upon which relief can be granted related to his claim that his right to due process was violated.**

A Plaintiff can prevail on a procedural due process claim by demonstrating that the property deprivation resulted from either 1) an established state procedure that itself violates due process rights, or 2) a “random and unauthorized act” causing a loss for which available state remedies would not adequately compensate the plaintiff. *Warren v. City of Athens, Ohio*, 411 F. 3d 697, 709 (6<sup>th</sup> Cir., 2005), *citing Macene v. MJW, Inc.*, 951 F. 2d 700, 706 (6<sup>th</sup> Cir., 1991). Plaintiff’s claim fails under either theory.

**1. Plaintiff has failed to exhaust his state law remedies, and, as a result, is not entitled to recovery for a violation of his right to procedural due process pursuant to §1983.**

In situations, such as this one, where the deprivation complained of is random and unauthorized, a plaintiff must establish three elements to prevail on his claim: 1) that he has a life, liberty or property interest protected by the Due Process Clause of the Fourteenth Amendment, 2) that he was deprived of this protected interest within the meaning of the Due Process Clause, and 3) that the state did not afford him adequate procedural rights prior to depriving him of their protected interest. *Hahn v. Star Bank*, 190 F. 3d 708, 716 (6<sup>th</sup> Cir., 1999). A plaintiff may only recover for an alleged due process violation under §1983 if he can demonstrate that the constitutional right was not adequately vindicated by state-law post-deprivation remedies. *Parratt v. Taylor*, 451 U.S. 527, 543-44 (1981). Plaintiff has failed to exhaust his state law remedies, and, as a result, his claim must fail.

The state law remedies available to Plaintiff are outlined in §1306.522 of the Lakewood Codified Ordinances. The law required Plaintiff to file an appeal with the Board of Building Standards and Building Appeals within 10 days of receipt of a notice that the building has been

condemned. §1306.522(e)(1). If, as in this case, the appeal results in an unfavorable decision, the owner or person in control of the structure shall have the right to appeal the decision and order of the Board to a court of competent jurisdiction.

Under Ohio law, such administrative appeals are governed by Chapter 2506 of the Ohio Revised Code. Section 2506.04 states that the court may “find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable and probative evidence on the record. Consistent with its finding, the court may affirm, reverse, vacate or modify the order, adjudication, or decision and remand the cause to the officer or body appealed from with instructions to enter an order, adjudication or decision consistent with the findings or opinion of the court.” Courts have consistently held that the relief available under Chapter 2506 is complete, beneficial and speedy. *Gardner v. City of Cleveland*, 656 F. Supp. 2d 751 (N.D. Ohio, 2009), citing *State ex. rel. Village of Chagrin Falls v. Geauga Bd. of Com’ners*, 96 Ohio St. 3d 400, 403 (Ohio, 2002).

In *Gardiner*, the plaintiff challenged two parking tickets that he had received. He requested and received a hearing before a hearing examiner, where the plaintiff testified that he was not driving the car at the time that the parking citations were issued. He did not present any other evidence. At the conclusion of the hearing, the hearing examiner found the Plaintiff liable for the citations. Instead of filing an appeal pursuant to Chapter 2506 of the Ohio Revised Code, the Plaintiff filed an action for relief under 42 U.S.C. §1983. The case was then removed to federal court. The federal court dismissed the action, holding that the Supreme Court has “limited the use of §1983 by holding that in a case involving deprivation of property without due process, a cause of action under §1983 is not available if there exists a state remedy that comports with procedural due process.” As plaintiff had failed to file an administrative appeal

under Chapter 2506, the defendant was entitled to dismissal of plaintiff's claims.

The same is true in this case. Plaintiff's appellate efforts were rejected, and his appropriate course of action was to file an appeal in the court of common pleas pursuant to Chapter 2506. His failure to do so warrants dismissal of this case, as he has failed to establish that the state law remedies available are inadequate.

**2. Even if this court were to determine that the deprivation occurred due to an unconstitutional established state law procedure, Plaintiff's claim still must fail.**

A Plaintiff alleging that his constitutional rights were violated by an established state law procedure would not need to demonstrate the inadequacy of state remedies. *Warren v. City of Athens, Ohio*, 411 F. 3d 697 (6<sup>th</sup> Cir., 2005). Thus, if the court were to determine that Plaintiff's alleged deprivation of his constitutional rights occurred pursuant to an unconstitutional state law procedure, Plaintiff would not be required to exhaust his state law remedies prior to bringing this federal law suit. However, Plaintiff's claim still fails even if he was not required to demonstrate that he exhausted his state law remedies.

The first step in a due process analysis is the determination of whether the interest at stake is within the Fourteenth Amendment's protection of liberty and property. *Hamilton v. Myers*, 281 F. 3d 520, 529 (6<sup>th</sup> Cir., 2002). Only after reaching a conclusion that the interest claimed is within that protection does this court consider the form and nature of the process that is due. *Id. Citing Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972). Thus, in a §1983 due process claim for deprivation of a property interest, a plaintiff must first show a protected property interest, and only after satisfying this first requirement, can a plaintiff prevail by showing that 'such interest was abridged without appropriate process.' *Id., quoting LRL Properties v. Portage Metro. Hous. Auth.*, 55 F. 3d 1097, 1108 (6<sup>th</sup> Cir., 1995).

As a result, it is clear that the requirements of due process are not triggered unless the Plaintiff demonstrates that he has a viable property interest, and, absent that demonstration, there can be no constitutional violation committed by local government agencies.

Although Plaintiff alleges that he was deeded an interest in 1570 Woodward Avenue, he concedes that he has not recorded his deed with the Cuyahoga County Recorder. As a result of Plaintiff's failure to file to his deed, the Lakewood Defendants did not have any method to verify his claimed property interest. Notably, although Plaintiff claims to have this interest, the Complaint does not allege that Plaintiff ever showed the Lakewood Defendants this deed, or did anything to demonstrate that he had any type of interest in this property other than verbally stating that he had such an interest. It is readily apparent that the Lakewood Defendants were entitled to verification of Plaintiff's claimed property interest prior to initiating proceedings. Indeed, absent such a verifiable property interest, the Lakewood defendants did not have any obligation to provide Plaintiff with process. As Plaintiff failed to make the initial showing to demonstrate to the Lakewood Defendants that he was, in fact, entitled to receive process, he cannot now claim that his rights to due process were violated.

**C. Lakewood Ordinance §156.04 is constitutional.**

Lakewood Ordinance §156.04 states "Application fee for the Board of Building Standards and Building Appeals (BBS) is twenty-five dollars (\$25.00)." Plaintiff argues that the provision is unconstitutional because "there is no provision for returning costs to a prevailing party." Complaint, ¶30. Plaintiff's claim that such a provision is required is not supported by law, and the City of Lakewood is entitled to dismissal of this claim.

Federal Courts have regularly held that, except in very narrow situations, filing fees are constitutional. *See United States v. Kras*, 409 U.S. 434 (1973) (holding that a filing fee is

constitutional in bankruptcy litigation); *Ortwein v. Schwab*, 410 U.S. 656 (1973) (holding that a provision requiring welfare recipients to pay a filing to challenge a reduction in their welfare benefits did not violate the due process clause or the First Amendment); *Hampton v. Hobbs*, 106 F. 3d 1281 (6<sup>th</sup> Cir., 1997) (upholding filing fee provisions of the Prison Litigation Reform Act); *Stonewall Union v. City of Columbus*, 931 F. 2d 1130 (6<sup>th</sup> Cir., 1991) (city ordinance that required participants in a parade to pay a filing did not violate the First Amendment), *Brown v. Leavenworth County, Kan.* 324 Fed. Appx. 720, 726 (10<sup>th</sup> Cir., 2009) (statute requiring \$5.00 fee for sheriff to effect service of process in a contract claim constitutional).

Even in cases where courts have held that filing fee provisions could violate constitutional rights, the remedy has been to allow certain individuals to proceed *in forma pauperis*, and to waive filing fees, not to return filing fees to a prevailing party. *See Boddie v. Connecticut*, 401 U.S. 371 (1971) (constitution requires a waiver of filing fee in divorce cases when the parties to the divorce are indigent).

Plaintiff has not claimed to be indigent, and is not claiming that his rights are being violated due to his inability to pay the filing fee. Instead, he claims that he should be entitled to have that fee refunded to him if he were to prevail. This position is not supported by law, and this claim should be dismissed.

**D. Plaintiff has failed to allege a violation of his First Amendment rights.**

The First Amendment provides that “Congress shall make no law respecting... the right of the people to peaceably assemble and to petition the Government for a redress of grievances.” A cause of action for a violation of the Petition Clause is subject to the same analysis applied to a claim arising under the Speech Clause. *Valot v. Southeast Local School Dist. Bd. of Educ.*, 107 F. 3d 1220, 1226 (6<sup>th</sup> Cir., 1997). Specifically, the right to petition is limited to matters of public

concern. *Id.* A particular expression addresses a matter of public concern where it can “be fairly considered as relating to any matter of political, social, or other concern to the community.” *Id.* citing *Connick v. Myers*, 461 U.S. 138, 146 (1983). Speech does not generally touch on a matter of public concern where its aim is to air or remedy grievances of a purely personal nature. *Id.* citing *Schalk v. Gallemore*, 906 F. 2d 491, 498 (10<sup>th</sup> Cir., 1990).

For example, in *Valot*, the plaintiffs filed suit alleging a violation of their right to petition after their substitute bus driving contracts were not renewed after the plaintiffs received unemployment benefits for the summer months. The court held that, while the availability of unemployment compensation is a matter of public concerns, Plaintiffs’ request for such benefits was “far more a matter of private interest than public concern.” As a result, the plaintiffs’ claim failed as a matter of law.

As in *Volat*, Plaintiff’s grievance is a matter of personal, and not public concern. Specifically, Plaintiff alleges that he attempted to appeal a decision related to a piece of property that he held a personal interest in. As in *Volat*, this is a private, and not public matter, as the grievance had to do with his particular interest, not in the nuisance proceedings in general.

As plaintiff has failed to state a claim under the First Amendment, this claim must be dismissed.

**E. As Plaintiff has failed to allege any constitutional violations, his claims against the City of Lakewood must also fail.**

Plaintiff’s final cause of action is a *Monell* claim against the City of Lakewood. Pursuant to *Monell*, a municipality cannot be held liable *solely* because it employs a tortfeasor. *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658, 691 (1978) (original emphasis). Instead, a plaintiff may only hold a government entity liable under § 1983 where its official

policy or custom actually serves to deprive an individual of his or her constitutional rights. *Gregory v. City of Louisville*, 444 F. 3d 725, 752 (6<sup>th</sup> Cir., 2006).

However, a plaintiff's *Monell* claim necessarily fails when it is determined that the plaintiff has not suffered any constitutional violations. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). In *Heller*, the plaintiff filed an excessive force claim against individual officers and a *Monell* claim against the municipality. The trial court bifurcated the trial, and first tried the plaintiff's claims against the individual officers. The jury returned a verdict for the individual officers, and against the plaintiff. The trial court then dismissed the plaintiff's claims against the municipality, holding that if the police officer had been exonerated by the jury there could be no basis for assertion of liability against the city. The appellate court reversed this decision, but the Supreme Court affirmed the trial court's ruling. The Supreme Court held that "neither *Monell*, nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm. If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutional excessive force is quite beside the point." *Id.*

This brief has already established that Plaintiff has failed to allege any constitutional violations against Defendant Ashby. As Defendant Ashby has not committed any constitutional violations and is entitled to have Plaintiff's claims against him dismissed, the City of Lakewood is likewise entitled to dismissal.

### **III. Conclusion**

For these reasons, Defendants Motion to Dismiss should be granted.

Respectfully submitted,

MAZANEC, RASKIN, RYDER & KELLER CO., L.P.A.

*s/Cara M. Wright*

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 12, 2010, a copy of the foregoing Defendants' Motion to Dismiss was filed electronically. Notice of this filing will be sent to all registered parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

A copy of the foregoing Defendants' Motion to Dismiss was served February 12, 2010, by depositing same in first-class United States mail, postage prepaid, to the following:

Peter Machlup  
1783 Cadwell Ave.  
Cleveland Heights, OH 44118

Plaintiff, pro-se

*s/Cara M. Wright*

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