

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

PETER MACHLUP,	)	CASE NO.: 1:10-CV-316
	)	
Plaintiff,	)	JUDGE DAN AARON POLSTER
	)	
vs.	)	<b><u>DEFENDANTS' REPLY IN SUPPORT OF</u></b>
	)	<b><u>THEIR MOTION TO DISMISS</u></b>
JEFF T. ASHBY, et al.,	)	
	)	
Defendants.	)	

The Defendants, Jeff T. Ashby and the City of Lakewood (collectively referred to as the “Lakewood Defendants”) are entitled to dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff has failed to allege “enough facts to state a claim to relief that is plausible on its face,” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009), and the Lakewood Defendants are entitled to judgment as a matter of law.

**A. Plaintiff failed to respond to the Lakewood Defendants’ arguments related to his First Amendment claims, and, as a result, this claim is deemed to have been waived.**

It is clearly established that a responding party waives any opposition to an opponent’s argument by failing to respond to their opponent’s argument. *Taylor v. Unumprovident Corp.*, 2005 WL 3448052 (E.D. Tenn., 2005). The Lakewood Defendants have asserted that Plaintiff’s First Amendment claims should be dismissed because the right to petition is limited to matters of public concern, not private grievances. *Valot v. Southeast Local School Dist. Bd. of Educ.*, 107 F.3d 1220, 1226 (6<sup>th</sup> Cir., 1997). Plaintiff has failed to address this argument, and as a result has waived this claim. Consequently, the Lakewood Defendants are entitled to judgment as a matter of law.

**B. Plaintiff failed to exhaust his administrative remedies, and the Lakewood Defendants are entitled to judgment as a matter of law.**

The United States Supreme Court has held that, “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). Under Ohio law, administrative appeals are governed by Chapter 2506 of the Ohio Revised Code. Pursuant to R.C. §2506.01, “every final order, adjudication, or **decision** of any **officer**, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state may be reviewed by the court of common pleas of the county in which the principal officer of the political subdivision is located.” (Emphasis added). Plaintiff’s selective excerpt of this statute is a blatant attempt to mislead the court into believing that the decision of Defendant Jeff Ashby to deny Plaintiff’s administrative appeal does not fall within the purview of an administrative appeal made pursuant to Chapter 2506 of the Ohio Revised Code. This position is false.

A simple reading of the plain language of this statute demonstrates that Plaintiff’s selective interpretation of the statute is incorrect, and that Plaintiff was required to file an appeal under Chapter 2506 as prerequisite for filing this §1983 lawsuit. Indeed, Defendant Ashby, as an officer for the city of Lakewood, made the decision to deny the Plaintiff’s appeal on the grounds that Plaintiff did not provide any proof to support his claimed interest in the property. This decision by a city officer clearly falls within the parameters of administrative appeals under Chapter 2506.

Furthermore, Plaintiff's assertion that he properly exhausted his administrative remedies by originally filing this lawsuit in the Cuyahoga County Court of Common Pleas is also incorrect. Plaintiff did not file an administrative appeal, he filed a lawsuit pursuant to §1983 claiming violations of his constitutional rights. Indeed, had Plaintiff properly filed an administrative appeal under Chapter 2506, this lawsuit would have been moot. It is nonsensical for Plaintiff to now assert that his decision to file a lawsuit asserting federal constitutional claims can be equivalent to filing an administrative appeal under Chapter 2506 of the Ohio Revised Code.

Plaintiff failed to exhaust his state law remedies, and, as a result, the Lakewood Defendants are entitled to dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

**C. Plaintiff failed to demonstrate that he had a property interest protected by the due process clause, and, consequently, the Lakewood Defendants were not required to provide him with any process.**

Plaintiff has mistakenly asserted that the Lakewood Defendants are challenging Plaintiff's standing to file this lawsuit. ECF 5, p. 4. This is not the case. Instead, the Lakewood Defendants are asserting that the Plaintiff is not entitled to any process, because he failed to demonstrate to the Lakewood Defendants that he had a property interest that fell within the Fourteenth Amendment's protection.

The law is clearly established that the first step in a procedural 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 the 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). Plaintiffs are not entitled to any process if it is determined that they do not have

an interest that is protected by the Fourteenth Amendment. *Karls v. Corrections Corp. of America*, 215 F. 3d 1326 (6<sup>th</sup> Cir., 2000).

Plaintiff has readily acknowledged that he has failed to record his deed. Under Ohio law, “recordation gives constructive notice to all persons dealing with the land of properly recorded instruments in the chain of title.” *Montgomery County Treasurer v. Gray*, 2004-Ohio- 2729, 2<sup>nd</sup> App. Dist. No. 20254. Thus, because Plaintiff failed to record his deed, the Lakewood Defendants were unable to determine whether Plaintiff actually had an interest in the property. While Plaintiff alleges in his Complaint that he told the Lakewood Defendants that he held an unrecorded deed, what he does not allege is more telling. Plaintiff does not allege that he showed his deed to the Lakewood Defendants. He does not allege that he swore in a notarized affidavit that he held such a deed. In fact, based upon what Plaintiff did not allege, it is clear that the only step he took towards demonstrating that he had a legally cognizable interest in the property was to make an allegation to that effect.

Absent proof that Plaintiff had a cognizable interest in the property, the Lakewood Defendants were not under any obligation to provide the Plaintiff with any process. If, as Plaintiff claims, he does hold a deed granting him interest in this property, he could have easily demonstrated that interest to the Lakewood Defendants. He chose to not provide documentation to substantiate his claim, and as a result, the Lakewood Defendants did not have an obligation to provide him with the hearing that he requested.

A contrary result would border on the nonsensical. Administrative hearings, such as the one that the Plaintiff requested, require municipalities to expend valuable time and resources. It would be wholly ineffective, and a terrible waste of taxpayer money, if individuals were entitled to due process hearings without first being required to demonstrate that they have a cognizable

interest in the property. Absent this requirement, individuals wholly unrelated to the property, like nosy neighbors, community activists or mere passersby could clog the system by requesting due process hearings related to property that they have absolutely no interest in whatsoever. This ludicrous result is clearly not what was intended when the due process clause was written.

Thus, in requesting his hearing, Plaintiff was required to demonstrate that he had a legally cognizable interest in the property that would trigger his right to due process under the Fourteenth Amendment. Plaintiff failed to provide any proof of his interest in the property, and, as a result, the Lakewood Defendants were not required to provide Plaintiff with any process.

**D. Plaintiff's grantor, Victoria Greenleaf, was provided an administrative appeal and timely filed suit under Chapter 2506.**

The Lakewood Defendants request that this court take judicial notice of the fact that Plaintiff's grantor, Victoria Greenleaf, was provided an administrative appeal, timely filed an appeal under Chapter 2506, and that her appeal was voluntarily dismissed after the property was voluntarily demolished. *See Greenleaf v. City of Lakewood*, Cuyahoga County Case No. CV-09-713417.

As a practical matter, the fact that an administrative appeal was permitted for the property negates Plaintiff's due process claims. As tenants in common, Ms. Greenleaf was able to vigorously defend Plaintiff's interest in the property, just as she defended her own interests. Furthermore, Plaintiff could have filed a motion to intervene or join in that lawsuit, and did not do so. Instead, Plaintiff failed to demonstrate that he had a cognizable interest in the property, and, as a result, was not entitled to any process.

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

As thoroughly discussed in the Motion to Dismiss, ECF 2, Lakewood Ordinance §156.04, which requires a \$25 filing fee for filing an appeal with the Board of Building Standards and Building Appeals, is constitutional. Plaintiff's arguments to the contrary are unpersuasive.

Plaintiff's reliance on *State v. Threatt*, 108 Ohio St. 3d 277, 2006-Ohio-905, and *State v. White*, 103 Ohio St. 3d 580, 2004-Ohio-5989, in support of his position that the ordinance is unconstitutional is wholly misplaced. These cases, which interpret an Ohio criminal statute, have absolutely no bearing on the constitutionality of the filing fee provision of Lakewood Ordinance §156.04. This statute, and the case law interpreting it, requires courts to assess court costs to defendants that are convicted of felonies as part of their criminal sentence and punishment for the crime that was committed. Clearly this statute is inapplicable and irrelevant to Plaintiff's claim in this case. Furthermore, contrary to Plaintiff's assertions, this statute and these cases are not grounded in the due process clause. Indeed, there are no references to the due process clause in either of these cases that would support plaintiff's position. As a result, these cases do not support Plaintiff's contention that the ordinance is unconstitutional.

Plaintiff's position that Lakewood Ordinance §156.10 is unconstitutional is not supported by law, and, as a result, the Lakewood Defendants are entitled to judgment as a matter of law.

**F. Conclusion**

For these reasons, the Lakewood Defendants are entitled to dismissal under Rule 12(b)(6).

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 March 16, 2010, a copy of the foregoing Defendants' Reply in Support of their 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.

*s/Cara M. Wright*

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