

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC.

SUPERIOR COURT

(FILED: April 21, 2015)

EDWARD P. BALBAT, DANIELLE :
BALBAT, STEVE DUBOIS, CHERYL :
DUBOIS, LOUIS PUCCI AND NANCY :
PUCCI :
Plaintiffs :

v. :

C.A. No. WC-2012-0004

COPAR QUARRIES OF WESTERLY, :
LLC; WESTERLY GRANITE :
COMPANY, INC.; THE TOWN OF :
WESTERLY; and MAINE DRILLING :
AND BLASTING, INC. :
Defendants :

DECISION

STERN, J. Before this Court is the Plaintiffs’ Motion for Leave to File a Third Amended Complaint. Plaintiffs—Edward P. Balbat, Danielle Balbat, Steve Dubois, and Cheryl Dubois—seek to add additional claims and one additional party to their already amended Complaint. Further, the Plaintiffs seek to clarify Count I against the Town of Westerly (Westerly or Defendant), claiming Westerly violated their procedural and substantive due process rights as protected under 42 U.S.C. § 1983. Westerly has filed an objection on the grounds that any amendment as it relates to Count I of the Plaintiffs’ Complaint would be futile. Also before this Court is Westerly’s Motion to Dismiss Count I of the Plaintiffs’ Second Amended Complaint¹, arguing that the Plaintiffs lack standing to challenge its decision to seek judicial assistance over the Notices of Violation appeals filed by Copar Quarries of Westerly, LLC (Copar) and Westerly Granite Company, Inc. (Westerly Granite). The Plaintiffs have filed a timely objection.

¹ The Plaintiffs’ Second Amended Complaint contains one count (Count I) against Westerly.

I

Facts and Travel

The facts underlying this dispute are extensive, and the parties are familiar with the lengthy travel of this case. Accordingly, this Court undertakes a minimal review of the facts pertinent to the Defendant's Motion to Dismiss Count I of the Plaintiffs' Second Amended Complaint and Plaintiffs' Motion for Leave to File a Third Amended Complaint.

A

Underlying Dispute

The current dispute arises from the quarrying operations conducted in the vicinity of the Plaintiffs' properties. Westerly Granite is the owner of property in Westerly (the Property) which it has leased to Copar since 2010.² Copar has used the property for quarrying, storing and processing rock, sand and gravel operations, and blasting.³ In 2011, the Plaintiffs and other neighbors living in close proximity to the quarry complained to Westerly regarding the significant noise, fugitive dust and vibrations, and heavy commercial traffic from Copar's operations.⁴ The Plaintiffs' complaints were intended to inform Westerly of the property damage being sustained as a result of the quarrying operations.

On November 2, 2012,⁵ Westerly's Zoning Official, Elizabeth Burdick, issued a revised Notice of Violation and Cease and Desist Order (NOV) to Copar and Westerly Granite, determining quarrying operations had been abandoned in the area known as the "Lucey

² Westerly Granite received a Zoning Certificate in 2007 noting that quarrying operations was a permitted use without having to first obtain a Special Use Permit.

³ It is alleged that Copar began using the Property for quarrying operations sometime in 2011.

⁴ Edward and Danielle Balbat, who are direct abutters to the quarry, purchased their property in 2006. Further, Steve and Cheryl Dubois live in the direct vicinity of the quarry, having purchased their property in 1992. Both parties allege that prior to 2011, they did not notice or witness quarrying operations at the Property.

⁵ This NOV was dated November 2, 2012 but was actually submitted on November 7, 2012.

Property.”⁶ The NOV was based on Copar’s expansion of the pre-existing and approved use of processing rock outside the “processing area,” and the repeated nuisance complaints by the neighbors, documentary evidence, and site inspections.⁷ Subsequently, Westerly’s Special Zoning Officer issued another Notice of Violation and Cease and Desist Order regarding the entire Property on February 12, 2013 (NOV II). Copar and Westerly Granite filed timely appeals to Westerly’s Zoning Board of Review.

In February of 2013, public hearings were held—but were not completed—regarding the first NOV, pursuant to G.L. 1956 § 45-24-66.⁸ During this time, Westerly Granite and Copar filed a Complaint against Westerly, WB-2013-0136, arguing that the quarrying operations at the Property constitute a legal nonconforming use.⁹ On November 12, 2013, Copar and Westerly Granite filed a motion for injunctive relief to preclude Westerly’s Zoning Board of Review from continuing to hold the appeal hearings due to alleged bias of certain members of the board. This Court issued an Order temporarily enjoining Westerly’s Zoning Board of Review from proceeding with the appeal hearings.¹⁰ On November 19, 2013, Westerly filed a motion seeking to invoke the jurisdiction of the Court to exclusively decide the underlying NOV and NOV II matters. Pursuant to §§ 45-24-60, 62, and G.L. 1956 § 9-30-1, this Court granted Westerly’s motion to exercise jurisdiction over the NOV appeals, resulting in both appeals being withdrawn

⁶ This NOV was first issued on August 7, 2012. The November 2, 2012 issuance constitutes the third time the NOV was revised.

⁷ Copar and Westerly Granite appealed the limited issue of whether the Defendants were required to obtain a Special Use Permit in order to continue operations on the Lucey Property.

⁸ Westerly’s Zoning Board of Review held two public hearings. The third scheduled meeting was continued, and the fourth never occurred.

⁹ This cause of action is the companion case to the Plaintiffs’ current cause of action. Westerly’s response to this companion case formed the basis for the Plaintiffs’ claim against Westerly.

¹⁰ The Order further stated that the Town Council for Westerly was to convene in special session to determine whether to request that this Court take jurisdiction over the appeals currently before its Zoning Board of Review, due to alleged bias of Town Officials.

from the Westerly Zoning Board of Review.

While these appeals were pending before this Court, Westerly's Zoning Official issued a new Notice of Violation and Cease and Desist Order (NOV III) to Copar and Westerly Granite on November 27, 2013. The NOV III alleged that certain quarrying operations were not permitted on the Property, and that excessive noise and fugitive dust were emanating from the Property.¹¹ On December 30, 2013, Westerly petitioned this Court to take jurisdiction over the NOV III appeal. Westerly's motion was granted, and this Court took jurisdiction over the NOV III appeal.¹²

The neighboring Plaintiffs moved to intervene in the WB-2013-0136 matter. After holding a hearing on the issue of intervention, this Court granted the neighbors the right to intervene for the limited purposes of discovery. A hearing was scheduled to take place before February 24, 2014 to determine whether the intervenors could participate in the trial. Before such a hearing took place, Westerly, Copar, and Westerly Granite entered into a Consent Agreement,¹³ effectively settling the companion case, WB-2013-0136.¹⁴

B

The Plaintiffs' Cause of Action

In January of 2012, the Plaintiffs filed their original action against Copar, Westerly

¹¹ Copar and Westerly Granite filed an appeal with Westerly's Zoning Board of Review for the NOV III. Westerly requested this Court take jurisdiction over the appeal. Upon granting the request, the NOV III was withdrawn at Westerly's Zoning Board of Review, and this Court took exclusive control over the appeal.

¹² This Court took jurisdiction over NOV III pursuant to the same statutory provision in which it took jurisdiction over the NOV and NOV II appeals.

¹³ On February 25, 2014, the Consent Agreement was entered into by this Court over objection from the Plaintiffs. The Consent Agreement declared that quarrying operations on the Property constitute a legally permitted, pre-existing use on the whole of the Property, subject to two areas where certain quarrying operations are prohibited.

¹⁴ The Plaintiffs—Intervenors in the companion case—have filed an appeal with the Supreme Court.

Granite, and Westerly. The Complaint relates to the operations of a quarry in close proximity to the Plaintiffs' properties.¹⁵ On March 17, 2014, the Court granted the Plaintiffs' Motion for Leave to File a Second Amended Verified Complaint (Second Amended Complaint). The Second Amended Complaint set forth a claim against Westerly, alleging that Westerly failed to hold any public hearings on the appeals of the previously appealed NOV's as required by §§ 45-24-64 and 45-24-66. The Plaintiffs allege that by invoking the Court's jurisdiction, Westerly prejudiced the Plaintiffs by preventing them from being able to voice their concerns, raise arguments, and present evidence at a public hearing.

Thereafter, Westerly moved to dismiss Count I of the Plaintiffs' Second Amended Complaint on the grounds that the Plaintiffs failed to state a claim upon which relief can be granted. The Plaintiffs filed an objection to Westerly's motion and additionally filed the current Motion for Leave to File a Third Amended Complaint (Third Amended Complaint). Through the motion, the Plaintiffs seek to add an additional party, Armetta LLC, as well as additional claims of Intentional and Negligent Infliction of Emotional Distress against the Defendants.¹⁶ Further, the Plaintiffs' motion seeks to clarify Count I, alleging Westerly's conduct violated the Plaintiffs' due process rights as protected under 42 U.S.C. § 1983.

¹⁵ The Plaintiffs filed their First Amended Verified Complaint on February 2, 2012. The count against Westerly sought to enjoin and restrain Westerly from permitting the quarrying operations to continue and requested the issuance of an injunction requiring Westerly to perform its duties as the licensing and enforcement agency.

¹⁶ The additional claims have not been brought against Westerly.

II

Standard of Review

A

Motion to Amend

Rule 15 of the Rhode Island Superior Court Rules of Civil Procedure governs amendments to pleadings. Rule 15(a) states, in pertinent part, that

“[a] party may amend the party’s pleading once as a matter of course at any time before a responsive pleading is served Otherwise a party may amend the party’s pleading only by leave of court or by written consent of the adverse party; and **leave shall be freely given when justice so requires.**” Super. R. Civ. P. Rule 15(a) (emphasis added).

“[T]he ‘true spirit of the rule is exemplified’ by the words ‘and leave shall be freely given when justice so requires.’” Harodite Indus., Inc. v. Warren Elec. Corp., 24 A.3d 514, 530 (R.I. 2011) (quoting Medeiros v. Cornwall, 911 A.2d 251, 253 (R.I. 2006)). Despite this standard, “the final decision whether to allow or to deny an amendment rests within the sound discretion of the trial justice.” Mainella v. Staff Builders Indus. Servs., Inc., 608 A.2d 1141, 1143 (R.I. 1992) (citations omitted). “Reasons for denying leave to amend include undue prejudice, delay, bad faith, and failure to state a claim.” Id. (citing Faerber v. Cavanagh, 568 A.2d 326, 329 (R.I. 1990)).

B

Motion to Dismiss

“The ‘sole function of a motion to dismiss’ pursuant to Rule 12(b)(6) is ‘to test the sufficiency of the complaint.’” McKenna v. Williams, 874 A.2d 217, 225 (R.I. 2005) (quoting R.I. Affiliate, ACLU v. Bernasconi, 557 A.2d 1232, 1232 (R.I. 1989)). In assessing a motion to dismiss, this Court “‘assumes the allegations contained in the complaint to be true and views the

facts in the light most favorable to the plaintiffs.” Giuliano v. Pastina, 793 A.2d 1035, 1036 (R.I. 2002) (quoting Martin v. Howard, 784 A.2d 291, 297-98 (R.I. 2001)). “The motion may then only be granted if it appears beyond a reasonable doubt that a [non-movant] would not be entitled to relief under any conceivable set of facts.” Pellegrino v. R.I. Ethics Comm’n, 788 A.2d 1119, 1123 (R.I. 2002) (internal quotations omitted).¹⁷

III

Analysis

A

Motion to Amend

The Plaintiffs seek leave to amend their Complaint in order to add new claims for relief, an additional party, and to clarify its cause of action against Westerly. The Defendants have objected to the Plaintiffs’ motion. Further, Westerly argues that the Plaintiffs’ motion should be denied since any amendment as it relates to the claim against Westerly would be futile.

1

Additional Party and Claims

As an initial matter, this Court will address the portion of the Plaintiffs’ motion relating to the request to add an additional party and two additional claims. The Plaintiffs’ additional claims—Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress—stem from the same set of facts set forth in the Plaintiffs’ Second Amended Complaint. Also, it is alleged that Armetta LLC has financial control over the Property and is therefore liable to the Plaintiffs for the harm suffered.

¹⁷ Our Supreme Court acknowledged that Rhode Island has not adopted the Federal court’s plausibility standard of review for a motion to dismiss as set forth in Ashcroft v. Iqbal, 556 U.S. 662 (2009) and Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). See Chhun v. Mortg. Elec. Registration Sys., Inc., 84 A.3d 419, 422-23 (R.I. 2014).

This Court has broad discretion to allow a party to amend its complaint. See Wilson v. Krasnoff, 560 A.2d 335, 342 (R.I. 1989). Given the current posture of this case, and since it has not been demonstrated that the Plaintiffs have acted in bad faith or there is unfair prejudice, this Court finds that leave to amend should be granted. Id. This decision conforms to the true spirit of Rule 15(a). See Medeiros, 911 A.2d at 253. Therefore, the Plaintiffs’ motion for leave is granted as it pertains to adding two additional claims and Armetta LLC as a defendant.

2

Clarification of Claim Against Westerly

The Plaintiffs also request leave to amend its claim against Westerly. The Plaintiffs seek to clarify their claim against Westerly by alleging a violation of their substantive and procedural due process rights as protected under 42 U.S.C. § 1983. Westerly contends that leave should be denied because there was no violation of the Plaintiffs’ protected rights when it petitioned the Court to exercise jurisdiction over the NOV appeals.

Leave to amend a complaint can be denied when such an amendment would fail to state a claim for which relief can be granted. See Mainella, 608 A.2d at 1143. Further, leave to amend should not be granted when it would be futile and needlessly prolong the dispute. See Harvey v. Snow, 281 F. Supp. 2d 376, 381 (D.R.I. 2003) (internal citations omitted) (stating futility refers to when an amendment fails to state a claim). To state a valid claim under 42 U.S.C. § 1983, the Plaintiffs must satisfy two elements. First, the Plaintiffs must allege a government entity acted under the color of state law. DiCiantis v. Wall, 795 A.2d 1121, 1125 (R.I. 2002) (quoting Brunelle v. Town of S. Kingstown, 700 A.2d 1075, 1081 (R.I. 1997)). Next, the Plaintiffs “must identify the federal right alleged to have been violated” by the actions of the government entity. Id.

Here, the Plaintiffs contend they have protected rights under the Fourteenth Amendment through their ownership of real property.¹⁸ See Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) (stating the right to enjoy property without unlawful deprivation represents a personal right). Further, the Plaintiffs argue to have the right to be heard at Westerly’s Zoning Board of Review regarding the NOV appeals. The Plaintiffs rely on § 45-24-66, which states a public hearing must be held for any appeal of a decision from a zoning officer. Specifically, this provision provides that “[t]he zoning board of review . . . shall give public notice [for the hearing on appeal] . . . any party may appear in person or by agent or by attorney.” See § 45-24-66. The Plaintiffs contend that by petitioning this Court to exercise jurisdiction over the NOV appeals, and by entering into the Consent Agreement, Westerly deprived them of their right to testify at a public hearing and further failed to perform its administrative role as the licensing and enforcement agency. Conversely, Westerly argues that seeking judicial assistance over the NOV appeals does not amount to a violation of the Plaintiffs’ protected rights.

In this case, Plaintiffs’ argument is misguided. If the NOV appeals were heard only before Westerly’s Zoning Board of Review, then the Plaintiffs would certainly be entitled to testify at the hearing. See id. If the Plaintiffs were prevented from speaking in front of the Westerly Zoning Board of Review, then a viable due process violation claim would surely exist.

The Zoning Enabling Act states that a city or town, through its solicitor, may bring suit in superior court “to restrain the violation of, or to compel compliance with, the provisions of its zoning ordinance.” See § 45-24-60; see also Town of Coventry v. Hickory Ridge Campground, Inc., 111 R.I. 716, 306 A.2d 824 (1973). Further, the superior court has the authority to issue rulings on such matters, in law or in equity, “to restrain the . . . use of any . . . land . . . used in

¹⁸ Since it is dispositive of the pending motions, this Court undertakes a review only of the second prong necessary to sustain a 42 U.S.C. § 1983 claim.

violation of the provisions of any zoning ordinance[.]” Sec. 45-24-62. There is clearly an avenue for cities or towns to seek judicial assistance in compelling compliance with local zoning ordinances. See Mauran v. Zoning Bd. of Review of Cranston, 104 R.I. 604, 607, 247 A.2d 853, 856 (1968). These provisions prevent undue burden on the courts, which would surely result from aggrieved neighbors taking appeals from unfavorable zoning board decisions. Town of Lincoln v. Cournoyer, 95 R.I. 280, 286, 186 A.2d 728, 731 (1962).

Here, Westerly’s decision to petition the Court to exercise jurisdiction over the NOV appeals was in response to Copar and Westerly Granite’s motion for injunctive relief, not an attempt to abort administrative review and infringe upon the rights of the Plaintiffs. Westerly has the statutory right to take such action and, once this Court exercises jurisdiction, a public hearing under § 45-24-66 is no longer necessary. See Hickory, 111 R.I. at 724, 306 A.2d at 829 (finding the Zoning Enabling Act provided an exclusive means for a municipality to seek judicial assistance). There is no provision limiting when a municipality may seek judicial review. Accordingly, Westerly’s decision does not violate any protectable property interest of the Plaintiffs. Further, by this Court invoking jurisdiction over these matters, the Plaintiffs still possessed the ability to raise its concerns regarding the quarry, albeit in a different setting. The Plaintiffs were allowed to intervene in the then pending matters before this Court.¹⁹ Although allowed to intervene only for the limited purpose of discovery, they were able to voice their objections to the Consent Agreement and were able to file an appeal with the Supreme Court.

Whether before the Westerly Zoning Board of Review or this Court, there exists the means for the public to participate—by testifying at a public hearing or by petitioning the Court to intervene. Due to the conduct of Town Officials and Board Members, Westerly sought

¹⁹ Furthermore, the Plaintiffs still possessed the ability to bring a nuisance claim against the Defendants.

judicial assistance. The decision of Westerly to seek judicial assistance, viewed on its own, does not establish a due process violation claim. The right to testify at a public hearing under § 45-24-66 was relinquished after the Court took jurisdiction and the appeals were withdrawn from the Westerly Zoning Board of Review. See Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972) (finding to have a protectable interest, a party must have a legitimate entitlement to the benefit sought, and not merely an expectation). Therefore, this Court finds that leave to amend Count I would be futile, since it would fail to sustain a claim that Westerly violated the Plaintiffs' due process rights. Accordingly, the Plaintiffs' motion is denied, in part.

B

Motion to Dismiss

This Court turns next to Westerly's Motion to Dismiss Count I of the Plaintiffs' Second Amended Complaint. Westerly argues that the Plaintiffs lack standing to bring their claim against Westerly. Alternatively, the Plaintiffs argue that they have the requisite standing.

1

Standing

This Court must consider whether Plaintiffs are entitled to institute the subject action against Westerly. For the Court to find the requisite standing, a party must allege "that the challenged action has caused him or her injury in fact." Narragansett Indian Tribe v. State, 81 A.3d 1106, 1110 (R.I. 2014) (citing Pontbriand v. Sundlun, 699 A.2d 856, 862 (R.I. 1997)). An injury in fact is characterized as "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" Cruz v. Mortg. Elec. Registration Sys., Inc., 108 A.3d 992, 996 (R.I. 2015) (quoting Pontbriand, 699 A.2d at 862). Our Supreme Court has found that a plaintiff lacks standing when he or she fails to

demonstrate a personalized injury distinct from the community as a whole. See e.g. N & M Props., LLC v. Town of West Warwick ex. rel. Moore, 964 A.2d 1141, 1145 (R.I. 2009); Meyer v. City of Newport, 844 A.2d 148, 151 (R.I. 2004); Ianero v. Town of Johnston, 477 A.2d 619, 621 (R.I. 1984).

The Plaintiffs allege that Westerly violated their constitutional rights when it failed to hold a public hearing regarding the NOV appeals, as required by §§ 45-24-64 and 45-24-66. As a result, the Plaintiffs claim that they were prevented from voicing their concerns, presenting facts and evidence, and raising arguments at a public hearing. However, the Complaint fails to demonstrate how Westerly's actions have injured the Plaintiffs. It is impossible for this Court to determine what the result would have been had the Plaintiffs testified at a public hearing, and accordingly, any damages alleged to have been suffered are conjectural and speculative. See Pontbriand, 699 A.2d at 862. This Court is not satisfied that the Plaintiffs can demonstrate that they have suffered an injury in fact as a result of Westerly's decision to seek judicial assistance and to settle the case with Copar and Westerly Granite. In Hickory, the court held that the city solicitor had the sole right to seek judicial assistance in zoning matters. 111 R.I. at 721, 306 A.2d at 827. Here, Westerly petitioned this Court to exercise jurisdiction—which it did—and enter into a Consent Agreement over the objection of the Plaintiffs. This action alone does not support a constitutional violations claim. Although disfavored by the Plaintiffs, Westerly has the exclusive right to take such action. See Town of Charlestown v. Beattie, 422 A.2d 1250, 1252 (R.I. 1980) (stating the solicitor has exclusive standing to seek judicial assistance for zoning violations).

Further, as discussed supra, §§ 45-24-60, 62 specifically allows for cities and towns to petition the court to exercise jurisdiction over zoning matters. Even though the Zoning Enabling

Act creates a right to testify at a public hearing, such a right is not infinite and is subject to the other provisions of this chapter. Compare § 45-24-66 with §§ 45-24-60; 45-24-62. By invoking the jurisdiction of this Court, § 45-24-66 was no longer controlling. The Plaintiffs have failed to demonstrate that Westerly acted with an improper purpose or attempted to stifle the Plaintiffs' voice in this matter when it sought judicial assistance. Westerly possesses the right to seek judicial aid and to settle disputes. See Arruda v. Sears, Roebuck & Co., 273 B.R. 332, 345 (D.R.I. 2002) (stating Rhode Island Courts favor the settlement of disputes between parties). This conduct does not support a viable constitutional violation claim.

Also, the Plaintiffs have not demonstrated that they have suffered a particular injury. Although they were unable to testify at a public hearing, the Plaintiffs were granted the right to intervene. There was no violation of their rights even though a Consent Agreement was entered into, over their objection, since the Plaintiffs could still file an appeal. See Local No. 93 Int'l Ass'n of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland, 478 U.S. 501, 529 (1986) (stating an intervenor cannot prevent the execution of the other parties' settlement agreement merely by withholding his or her consent). At every point in this case, the Plaintiffs were afforded an opportunity to participate. Although the Plaintiffs may be unhappy that it could not raise its arguments before the matter was resolved by the Consent Agreement, it does not support a cause of action against Westerly.

Furthermore, this Court does not believe the Plaintiffs have demonstrated a personalized injury. The Plaintiffs' alleged injury stems from the discontinuance of public hearings at the Westerly Zoning Board of Review. Failing to hold a public hearing on a zoning appeal prevents all citizens from voicing their concerns. In this case, the Plaintiffs have not distinguished how

their alleged injury is distinct from that of the community at large.²⁰ As a result, the Plaintiffs have not demonstrated the requisite standing. See Meyer, 844 A.2d at 151 (finding the Plaintiffs failed to demonstrate a particularized injury differing from that of the community at large).

IV

Conclusion

For the reasons stated herein, this Court grants, in part, and denies, in part, the Plaintiffs' Motion for Leave to File a Third Amended Complaint. Further, Westerly's Motion to Dismiss Count I of the Plaintiffs' Second Amended Complaint is granted. The Defendant shall prepare the appropriate judgment for entry.

²⁰ The Plaintiffs, in their objection to Westerly's motion to dismiss, argues their basis for the cause of action against Westerly was Westerly's failure to provide a public hearing under § 45-24-66. See Pls.' Obj. to Def.'s Mot. to Dismiss pp. 8-9.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: **Balbat v. Copar Quarries of Westerly, LLC, et al.**

CASE NO: **WC-2012-0004**

COURT: **Providence County Superior Court**

DATE DECISION FILED: **April 21, 2015**

JUSTICE/MAGISTRATE: **Stern, J.**

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