

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-240

JANUARY TERM, 2004

	} APPEALED FROM:
John Tracy Adams II and	}
Adams Family Properties, Inc.	} Rutland Superior Court
	}
v.	}
	} DOCKET NO. 357-6-99 Rdcv
Town of Fair Haven, John	}
Lulek, Robert Richards, John	} Trial Judge: Richard J. Norton and David A.
Seamans and Jay Brown	} Jenkins
	}

In the above-entitled cause, the Clerk will enter:

Plaintiffs John Tracy Adams II (Adams) and Adams Family Properties, Inc. (AFP), appeal from the trial court's order granting summary judgment for the individual named defendants, John Lulek, Robert Richards, John Seamans and Jay Brown, members of the Town of Fair Haven Board of Water Commissioners. Plaintiffs argue that the court erred in: (1) reconsidering its summary judgment ruling sua sponte without providing notice; and (2) granting summary judgment for defendants. We affirm in part, and reverse and remand in part.

This appeal involves the Town of Fair Haven's refusal, by and through its Board of Water Commissioners, to replace, at its expense, a 3/4 inch service line with a two inch service line from the A curb stop@ to an apartment house owned by AFP. Plaintiffs alleged that the town was contractually bound to install the line pursuant to an April 2, 1999 Memorandum of Understanding signed by the town manager/water superintendent and by Adams on behalf of AFP. The memorandum provided, in relevant part, that

it has been determined that the existing 3/4" service line needs to be replaced with a 2" line. This replacement will be done during the Spring of 1999 by the Public Works Department with assistance from Dick Hall. The water line replacement project is to be completed prior to the State of Vermont paving of Rte. 22A, which will take place during the 1999 Paving Season.

The Board of Water Commissioners refused to approve the agreement, or pay for the service line, and Adams filed a complaint against defendants. Adams stated his legal claim against the individual named defendants as follows: A [the] refusal to perform and breach of contract is without any legal justification, and is being knowingly maliciously maintained in conscious disregard of the Plaintiff's rights, to cause injury to the Plaintiff and for personal political advantage to the individual Defendants.@

There was some confusion over the exact nature of Adams's legal claim. At a November 1999 motion hearing, the trial court construed Adams's complaint as raising a claim of A intentional interference with a contract by the individual.@ The court stated that the complaint did not raise a 42 U.S.C. ' 1983 claim, but indicated that the parties could A ferret it out from discovery.@ Adams did not object to this characterization. In January 2000, the town notified the court and Adams that Adams did not appear to be the real party in interest as required by V.R.C.P. 17(a). Adams did not respond to this notification. In June 2000, after discovery had been completed, individual defendants moved for summary judgment, arguing that Adams could not produce evidence to support an intentional interference with contract claim, defendants were entitled to immunity, and Adams was not the real party in interest. Adams filed a motion in opposition

with supporting affidavits and documents. In his opposition memorandum, Adams asserted that he had articulated a claim against defendants under 42 U.S.C. ' 1983 and that fact disputes precluded entry of summary judgment on this claim.

The court denied defendants' motion in a July 2000 entry order, explaining that disputed facts remained and it couldn't A say as a matter of law that the individuals can't be found liable. The court added that it had not entered judgment on 42 U.S.C. ' 1983 claims and that A [i]mmunity depends upon disputed facts. In a separate entry order, the court ordered AFP joined as a party A as its interests at stake in this case. The trial court did not specify what additional steps, if any, the parties needed to undertake to accomplish joinder. Although counsel entered an appearance on behalf of AFP in August 2000, the record does not show that AFP formally adopted the claims raised in Adams' complaint or raised any additional claims of its own.

Defendants requested permission to appeal the court's summary judgment decision under V.R.A.P. 5.1 regarding their entitlement to immunity, and Adams filed a motion in opposition. AFP did not join Adams in filing a memorandum in opposition. While defendants' motion was pending, the court reconsidered its summary judgment decision sua sponte and on January 2, 2001, issued an opinion granting summary judgment for the individual defendants, and dismissing the individual defendants with prejudice. The court explained that it had been persuaded by a further review of the file and further reflection that the issue deserved more than an entry order disposition, and, in undertaking that effort, the court concluded that the decision should be changed. The court found that there were no specific facts to support a claim of tortious interference with a contract by the individual defendants. The court also concluded that plaintiffs had failed to demonstrate that defendants were not entitled to immunity. The court seemed to reject any 42 U.S.C. ' 1983 claim that plaintiffs may have raised, stating,

this case is not one involving substantive denial of constitutional rights. This is essentially a breach of contract case. There are allegations of procedural shortcomings but there must be more. There must be violations of clearly established statutory or constitutional rights. Levinsk[y] v. Diamond, 151 Vt. 178, 190 (1989). Every procedural error does not give rise to a constitutional due process claim. To invoke constitutional claims under a 1983 action, there must be some substantive deprivation of meaningful property or civil rights. Every breach of contract by a governmental entity which may include procedural missteps doesn't present a constitutional violation. The remedy of recovering damages for the breach of contract would be against the town.

Adams filed a motion for permission to appeal from the court's summary judgment order pursuant to V.R.A.P. 5(b) or for reconsideration. The court denied the motion, explaining in part that A [a]lthough the motion to reconsider presents the opportunity to set forth any further proof plaintiff may have of the selectmen's personal interest, motivation, or benefit/purpose he may have, none is offered.

In August 2002, Adams and AFP entered into a stipulated agreement with the town pursuant to which the court dismissed all of Adams' contract claims with prejudice and both plaintiffs' claims A of any sort against the town with prejudice. The stipulation provided that the only claim or claims not dismissed by agreement were those claims of Adams stated in the complaint against the individual named defendants. The stipulation also dismissed all of AFP's claims against the town with prejudice, A except any 42 U.S.C. ' 1983 claim. The ' 1983 reference was added to the stipulation and defendant Town of Fair Haven, by and through its agents, indicated that it did not admit, agree, or concede that AFP had ever made or stated such a claim.

On April 15, 2003, the court entered a final judgment order dismissing A all claims of either plaintiff whatsoever against the town. On April 23, 2003, the court issued a final judgment order in favor of individual defendants. This order provided that final judgment was entered in favor of the individual named defendants for the reasons set forth in the court's January 2, 2001 summary judgment ruling. It also stated that A [a]ll claims of Plaintiff Adams Family Properties, Inc. are dismissed with prejudice, except any 42 U.S.C. ' 1983 claim. All contract claims of John Tracy Adams, II are dismissed with prejudice. Plaintiffs appealed from the court's April 23, 2003 final judgment order.

Both Adams and AFP raise the same arguments on appeal, but given the procedural disarray in this case, we first

address these arguments as they relate to AFP. AFP argues that the court erred in granting summary judgment for defendants sua sponte, without providing it an opportunity to demonstrate that questions of material fact existed. AFP also maintains that summary judgment was inappropriate because there are outstanding questions of material fact as to its 42 U.S.C. ' 1983 claim. While the trial court appears to have granted defendants summary judgment on any 42 U.S.C. ' 1983 claim that AFP may have raised, the court= s January 2001 summary judgment order is contradicted by the terms of the court= s final judgment order, which dismisses all of AFP= s claims with prejudice, except A any@ 42 U.S.C. ' 1983 claim.

To the extent that the court intended to reject any claim that AFP may have raised under 42 U.S.C. ' 1983, we conclude that the court erred in granting summary judgment sua sponte without providing AFP with an opportunity to demonstrate that material questions of fact remained. While the trial court retains jurisdiction to modify or rescind a prior interlocutory order until it issues a final decree, it must give an opposing party a reasonable opportunity to show the existence of a fact question before granting summary judgment. See Kelly v. Town of Barnard, 155 Vt. 296, 307 (1990). AFP was ordered joined as a party in July 2000, contemporaneous with the court= s initial denial of defendants= motion for summary judgment. The court reconsidered its opinion, and granted summary judgment for defendants in January 2001. Because AFP joined the case after defendants= summary judgment motion was initially denied, and because the court reversed its prior order sua sponte, AFP did not have a reasonable opportunity to demonstrate the existence of unresolved questions of material fact. In light of this error, and mindful of the inconsistency between the court= s summary judgment order and its final judgment order, we reverse and remand the trial court= s final judgment order with respect to its dismissal of AFP= s claim against the individual defendants.

We find no error in the trial court= s sua sponte summary judgment order with respect to Adams. Adams acknowledges that the court retains jurisdiction to modify its interlocutory orders, but he argues that, in this case, the court abused its discretion in doing so. In support of this assertion, he points to the following: the lapse of time without activity in the case; the dispositive nature of the ruling; the sua sponte nature of the act; the addition of another party (AFP) after the original summary judgment motion was filed; and the absence of any urgency that would have prevented the court from providing notice. Adams has not demonstrated that the court abused its discretion. Unlike AFP, the record shows that Adams had a reasonable opportunity to show the existence of a factual question before summary judgment was entered for defendants. Adams filed a memorandum in opposition to defendants= motion for summary judgment and provided the court with affidavits and documents in support. After the trial court sua sponte granted defendants= motion for summary judgment, Adams filed a motion for reconsideration, which provided him with an additional opportunity to present evidence that would defeat summary judgment. We find no error in the court= s sua sponte reconsideration of its summary judgment ruling as to Adams.

Adams next argues that the court erred in granting summary judgment because disputes of fact existed. He maintains that his claim below was that the individual defendants, acting as water commissioners for the town, used the authority of their office to deprive him of the benefits of a contract he had made with the town water department without due process of law in violation of their constitutional rights. He asserts that because he has produced some evidence in support of the essential elements of this claim, summary judgment should not have been granted for defendants.

First, the record does not support Adams= s assertion that he clearly stated a claim under 42 U.S.C. ' 1983 below. Under Vermont Rule of Civil Procedure 8(a), a complaint must contain A a short and plain statement of the claim showing that the pleader is entitled to relief.@ A The test of whether a particular pleading is sufficient under Rule 8(a) is whether it gives fair notice of the claim and the grounds upon which it rests.@ Limoge v. People= s Trust Co., 168 Vt. 265, 274 (1998). There is no reference to a violation of 42 U.S.C. ' 1983 in Adams= s complaint, and he did not request to amend the complaint. The trial court rejected the assertion that Adams raised such a claim in his complaint, and Adams did not object to the court= s interpretation. It appears that Adams raised this claim for the first time in response to the individual defendants= motion for summary judgment. Notwithstanding this infirmity, the trial court appears to have ruled on Adams= 42 U.S.C. ' 1983 claim in its summary judgment order in favor of defendants.

We review a grant of summary judgment using the same standard as the trial court. Richart v. Jackson, 171 Vt. 94, 97 (2000). Summary judgment is appropriate when, taking all allegations made by the nonmoving party as true, there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Id.; V.R.C.P. 56(c).

To state a claim under 42 U.S.C. ' 1983, Adams must allege that defendants deprived him of a right secured by the Constitution or laws of the United States and that such deprivation was committed by persons acting under color of state law. See 42 U.S.C. ' 1983; Walentas v. Lipper, 862 F.2d 414, 418 (2d Cir. 1988). Adams argues that he possesses a protected property interest in the memorandum of understanding signed by the town and AFP. We disagree.

A The range of interests protected by section 1983 is limited.@ Walentas, 862 F.2d at 418.

Property interests protected by due process are neither created nor defined by the Constitution. A Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law B rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.@

Martz v. Inc. Village of Valley Stream, 22 F.3d 26, 29 (2d Cir. 1994) (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)). A To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.@ Roth, 408 U.S. at 577.

While the term A property@ includes an expectation of continued employment based on a employment contract, see e.g., Roth, 408 U.S. 564, 570 (1972), it does not extend to the type of contract dispute at issue in this case. As the Walentas court explained, A while entitlement to protected benefits may be conferred by statute or by contract, it is relatively clear that a contract dispute, in and of itself, is not sufficient to give rise to a cause of action under section 1983.@ Walentas, 862 F.2d at 418 (internal citations omitted). Any A right@ that Adams has here, if he is indeed the proper party to assert such a claim, is a disputed contract right, not a protected property interest. See id. at 419 n.1; Martz v. Inc. Village of Valley Stream, 22 F.3d 26, 31 (2d Cir. 1994) (plaintiff= s claim of right to payment based on ordinary contract with municipality, and municipality= s alleged breach of such contract, A does not rise to the level of a constitutionally protected property interest@). Adams does not have a constitutionally protected property interest in the memorandum of understanding as a matter of law, and therefore summary judgment was appropriately granted for defendants on this claim.

In view of our disposition with respect to Adams, we revisit the status of AFP to avoid more procedural confusion on remand. Although the court ordered AFP to be joined, no party took any action to effectuate this order. As a result, AFP was never required to plead; its counsel simply filed a notice of appearance without filing a complaint. However, by virtue of the unappealed orders in this case, AFP is limited to ' 1983 claims. Thus, to implement the remand, AFP is directed to file and serve a complaint within thirty days of the decision, stating its ' 1983 claims. Further proceedings will be based upon this complaint.

Affirmed in part and reversed and remanded in part.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

John A. Dooley, Associate Justice

Paul L. Reiber, Associate Justice