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## Appellate Division, Fourth Department, Masi Management Inc., v. Town of Ogden

Courtney Aronowsky

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**Appellate Division, Fourth Department, Masi Management Inc., v. Town of Ogden**

**Cover Page Footnote**

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## EQUAL PROTECTION

*U.S. CONST. amend. XIV, § 1:*

*All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

*NY CONST. art. I, § 11:*

*No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.*

### SUPREME COURT, APPELLATE DIVISION FOURTH DEPARTMENT

Masi Management Inc., v. Town of Ogden<sup>1</sup>  
(decided June, 16, 2000)

Plaintiff, Masi Management, was a contract vendee of a fifty-two-acre parcel in the defendant's town of Ogden.<sup>2</sup> Masi alleged that its equal protection rights as set forth in both the Federal<sup>3</sup> and State<sup>4</sup> Constitutions were violated when defendant

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<sup>1</sup> 273 A.D.2d 837, 709 N.Y.S.2d 734 (4th Dep't 2000).

<sup>2</sup> *Id.*, 709 N.Y.S.2d at 735.

<sup>3</sup> U.S. CONST. amend XIV, § 1 states:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

prevented him from developing a parcel of land described in his application to the town. In addition, Masi maintained that its due process rights were violated.<sup>5</sup> The Appellate Division Fourth Department affirmed the trial court's decision holding that Masi failed to demonstrate that the defendant and its officials acted in an "illegal and malicious manner."<sup>6</sup> The trial court concluded that Masi's rights under the New York State Constitution and the United States Constitution<sup>7</sup> were violated. In response to plaintiff's Due Process Claim, the court held that Masi did not have sufficient entitlement to "the continuation of the (residential two family) R-2 designation of the parcel, a permit to build a duplex unit, or the reclassification of the parcel."<sup>8</sup> The court determined that Masi did not have a valid due process claim because it failed to show a legitimate claim of entitlement to the parcel of land for development.<sup>9</sup>

Masi's land had been classified as a two family residential parcel (R-2).<sup>10</sup> The Planning Board of Ogden urged Masi to alter its plan.<sup>11</sup> The planning board suggested that a multi-use project plan replace the existing plan of rental units with patio homes.<sup>12</sup> Soon after, Masi submitted an application to rezone the parcel to allow "single family homes, patio homes, an apartment complex and a retail/office building."<sup>13</sup> After Masi submitted the rezoning

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process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Id.*

<sup>4</sup> NY CONST. art., 1 § 11 states:

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

*Id.*

<sup>5</sup> *Masi Management*, 273 A.D.2d at 839, 709 N.Y.S.2d at 736.

<sup>6</sup> *Id.*

<sup>7</sup> U.S. CONST. amend XIV, § 1.

<sup>8</sup> *Masi Management*, 273 A.D.2d at 839, 709 N.Y.S.2d at 736.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 837, 709 N.Y.S.2d at 735.

<sup>12</sup> *Id.*, 709 N.Y.S.2d at 734.

<sup>13</sup> *Masi Management*, 273 A.D.2d at 837, 709 N.Y.S.2d 734.

application, a competing developer submitted an application.<sup>14</sup> The competing developer planned to rezone a fifty-acre parcel from an R-2 classification to a senior citizen housing district classification.<sup>15</sup> This plan included single family patio homes, for lease or purchase, and three apartment buildings.<sup>16</sup>

Masi wanted to hasten the application process.<sup>17</sup> To accomplish this, Masi amended his application to replace the patio homes with duplex homes.<sup>18</sup> The change in the application would make Masi's application in compliance with the necessary R-2 classification.<sup>19</sup> Despite the compliance with the R-2 classification, the Town Board denied Masi's application. In addition, the Town Board eliminated the R-2 classification for the area, except for two of Masi's parcels.<sup>20</sup> Although Masi's application conformed to the eliminated R-2 classification, exceptions were made for parcels owned by a town board member and the competing developer.<sup>21</sup> Approximately two weeks later, the Board adopted a law that declared the competing developer's parcel a senior citizen housing district.<sup>22</sup>

Since the Board denied Masi's R-2 application prior to the elimination of the R-2 classification and did not deny the competing developer's application to modify R-2 land, plaintiff alleged that its state and federal equal protection rights were violated.<sup>23</sup> Masi sought reversal of trial court's decision,<sup>24</sup> contending that the Board did not want its land developed and therefore eliminated the R-2 classification.<sup>25</sup> Likewise, Masi stated that the Board's frustrated procurement of a hearing on its application provided misleading information and the unequal

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Masi Management*, 273 A.D.2d at 837, 709 N.Y.S.2d at 734.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Masi Management*, 273 A.D.2d at 839, 709 N.Y.S.2d at 736.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

assistance to the competing developer.<sup>26</sup> These actions supported Masi's belief that the Board did not want Masi to develop its land.<sup>27</sup> Masi further alleged that the matrimonial relationship between the attorney of the competing developer and a board member supported its allegations that the Board acted maliciously, with the intent to harm the plaintiff.<sup>28</sup>

The court held that Masi did not have a Federal or New York equal protection constitutional claim.<sup>29</sup> The court relied on the case of *In the Matter of 303 West 42nd Street Corporation v. Klein*.<sup>30</sup> As in *Masi Management*, the plaintiff in *303 West 42nd Street Corporation* alleged that the city's Department of Buildings did not want the plaintiff to build an adult bookstore and two adult theaters.<sup>31</sup> Therefore, the plaintiff claimed the Department of Building's accusations of fire and safety problems were discriminatory since the department's previous reviews never indicated any problems.<sup>32</sup> The defendant explained that it was trying to eliminate sex shops from the Time Square, New York neighborhood. Plaintiff's plans became a part of the elimination process.<sup>33</sup> The court in *303 W. 42nd St. Corp.* focused on federal equal protection rights. They stated that the plaintiff must prove that the public authority was "applying or enforcing and admittedly valid law with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances."<sup>34</sup>

Establishing this claim required the plaintiff to prove that the law was not applied to others in similar situations and that the selective enforcement of the law was deliberately based upon race, religion or another classification.<sup>35</sup> Unlike the court in *Masi Management*, the court found that *303 W. 42nd St. Corp.* satisfied

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<sup>26</sup> *Id.* at 837-38, 709 N.Y.S.2d at 735-36.

<sup>27</sup> *Id.*

<sup>28</sup> *Masi Management*, 273 A.D.2d at 839, 709 N.Y.S.2d at 736.

<sup>29</sup> *Id.*

<sup>30</sup> 46 N.Y.2d 686, 389 N.E.2d 815, 416 N.Y.S.2d 219 (1979).

<sup>31</sup> *Id.* at 690, 389 N.E.2d at 816, 416 N.Y.S.2d at 222.

<sup>32</sup> *Id.* at 691 389 N.E.2d at 817, 416 N.Y.S.2d at 223.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 693, 389 N.E.2d at 819, 416 N.Y.S.2d at 224 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

<sup>35</sup> *303 W. 42nd St.*, 46 N.Y.2d at 693, 389 N.E.2d at 819, 416 N.Y.S.2d at 224.

the necessary criteria to establish Federal and State Equal Protection Claims.<sup>36</sup> *In the Matter of 303 W. 42nd St. Corp.* demonstrated that the selective enforcement of the building regulations were due to the nature of the shop that was being built (a sex shop).<sup>37</sup> The court concluded that, the building regulations were discriminatorily enforced due to the type of shop.<sup>38</sup> In *Masi Management*, the plaintiff failed to demonstrate that the competing developer and itself were similarly situated, thus undermining that the plaintiff's claim.<sup>39</sup> The *Masi Management* court did not have to analyze any further issues because the plaintiff did not meet its burden of production.

The New York State constitution entitles equal protection to all people and guarantees that no person shall be discriminated against in his civil rights.<sup>40</sup> *Masi Management* alleged that the Planning Board violated its rights established in the New York State constitution.<sup>41</sup> Masi's allegations for the New York claim were the same as its allegations for the federal claim. The allegations included the defendant's intention to prevent Masi from developing the parcel by eliminating the R-2 classification.<sup>42</sup> Next, Masi claimed that defendant interrupted its effort to obtain a public hearing on its project application. Third, Masi alleged that the defendant provided misleading information.<sup>43</sup> Masi also alleged that the Board expedited the competing developer's application but did not assist Masi.<sup>44</sup> Lastly, Masi alleged that the Board acted

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<sup>36</sup> *Id.* at 696, 389 N.E.2d at 820, 416 N.Y.S.2d at 225.

<sup>37</sup> *Id.* at 693, 389 N.E.2d at 819, 416 N.Y.S.2d at 224.

<sup>38</sup> *Id.* at 696, 389 N.E.2d at 820, 416 N.Y.S.2d at 225.

<sup>39</sup> *Masi Management*, 273 A.D.2d at 839, 709 N.Y.S.2d at 736.

<sup>40</sup> NY CONST. art. I § 11.

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

*Id.*

<sup>41</sup> *Masi Management, Inc.*, 273 A.D.2d at 837, 709 N.Y.S.2d at 735.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

with malicious intent since the attorney for the competing developer was married to a Board member.<sup>45</sup>

Despite Masi's extensive list of allegations against the defendant, Masi understood that New York does not have any precedent applying the rights and privileges granted by the New York Constitution in the land use regulation context.<sup>46</sup> The Supreme Court of the Appellate Division, Fourth department, refused to create such rights for land regulation cases.

The court looked to the case of *Crowley v. Courville* in its analysis of the plaintiff's due process claims.<sup>47</sup> In *Crowley*, Mr. Crowley alleged that his constitutional rights were violated based on a parking variance. The variance was established in 1975, prior to his purchase of the land.<sup>48</sup> The court considered the substantive due process rights first, because without it the plaintiff's claim is without merit.<sup>49</sup> The court noted that a claim requires substantive due process rights before it may be considered. Initially, the court stated that they carefully review land use cases. They did not want the federal courts to become an institution that reviews the constitutionality of local legislative agency decisions arising from disputes between begrudged parties.<sup>50</sup>

Due to the court's concern against becoming a property disputes forum, the court established two elements necessary to satisfy a due process claim resulting from a property dispute. Plaintiff must have a valid property interest within the meaning Constitution and show that the defendant acted in an "arbitrary or irrational manner in depriving the plaintiff of that property interest."<sup>51</sup> The *Crowley* court explained that in order to have a constitutional property interest, the plaintiff must first have "a legitimate claim of entitlement."<sup>52</sup> Crowley's property did not meet the constitutional requirements because his claim was based on a parking variance issued prior to his purchase of the land for a

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<sup>45</sup> *Id.*

<sup>46</sup> 273 A.D.2d at 839, 709 N.Y.S.2d .at 736.

<sup>47</sup> 76 F.3d 47 (2d Cir. 1996).

<sup>48</sup> *Id.* at 50.

<sup>49</sup> See U.S. CONST. amend.V, which provides in pertinent part: "No person shall be deprived of life, liberty, or property, without due process of law." *Id.*

<sup>50</sup> *Crowley*, 76 F.3d at 52.

<sup>51</sup> *Id.*

<sup>52</sup> *Zahra v. Town of Southold*, 48 F.3d 674, 680 (2d Cir. 1995).



office building, not for his planned retail building. Since Crowley did not have a property interest, it was unnecessary to continue analyzing whether the defendant acted in a “arbitrary and irrational manner.”<sup>53</sup>

Similarly, Masi Management was held to be without a due process claim. The court’s decision was based on the *Crowley* decision. Masi did not have a “legitimate claim of entitlement” to the continuation of the R-2 designation of the parcel, a permit to build duplex units, or the reclassification of the parcel.”<sup>54</sup> In addition, the court in *Rivervale Realty Co, Inc.* discussed that when a town board considers many issues, including but not limited to issues of zoning or application selection, decisions are made at the board’s discretion.<sup>55</sup>

New York State courts generally adhere to the rule developed in *303 W. 42nd St.* The rule states that the Equal Protection Clause requires the plaintiff to show that the law was not enforced against others similarly situated and that the selective application of the law was deliberately based upon an impermissible standard such as race, religion, or some arbitrary classification. *Masi Management* did not satisfy this requirement. They were unable to prove that the board acted with an evil eye and an unequal hand. Both requirements of this rule were necessary.

*Crowley* discussed the Federal Equal Protection Clause on selective enforcement. Similarly, to the New York rule, the federal clause applies when “the person, compared with others similarly situated, was selectively treated; and such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights or malicious or bad faith intent to injure a person.”<sup>56</sup>

The court in *Crowley* found that the plaintiff failed to satisfy these criteria because the treatment established only that people in similar situations were given different treatment. The

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<sup>53</sup> *Id.* at 52.

<sup>54</sup> *Masi Management*, 273 A.D.2d at 839, 709 N.Y.S.2d at 736.

<sup>55</sup> In the Matter of Riverdale Realty, 565 N.Y.S.2d 583, 170 A.D.2d 762 (3d Dep’t 1991).

<sup>56</sup> *Crowley*, 76 F.3d at 52.

court concluded that different treatment does not automatically mean that the enforcement was made in bad faith.

Both the federal and state equal protection clauses are very similar. The federal equal protection clause is more specific than the New York equal protection clause, but they cover the same basis for equal protection rights. The federal clause examines the alleged negative treatment in a more precise manner. The federal law looks beyond the deliberate acts and breaks the act down into elements. The Federal equal protection clause by selective enforcement requires that the aggrieved party was “selectively treated and that the treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights or malicious or bad faith intent to injure a person.”<sup>57</sup>

New York forbids a public authority from applying established law “with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances.” New York law requires that both the “unequal hand” and the “evil eye” be proven. Despite the more intricate and specific wording of the federal statute, the two clauses are very similar and generate similar results.

*Courtney Aronowsky*

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<sup>57</sup> *Id.*