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Takings Clause

SUPREME COURT, APPELLATE DIVISION

FIRST DEPARTMENT

Dawson v. Higgins[42]
(decided April 5, 1994)

Plaintiffs challenged the constitutionality of a New York City rent-control provision prohibiting landlords from evicting tenants, for the landlord's personal use, who have occupied their apartment for twenty years or more,[43] as a taking of property without just compensation,[44] as well as a violation of due process rights and the prohibition against involuntary servitude.[45] The court held that the regulations did not violate either the State or Federal Constitutions because they did not amount to a physical

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42. 197 A.D.2d 127, 610 N.Y.S.2d 200 (1st Dep't 1994).

43. *See* NEW YORK CITY, N.Y., ADMIN. CODE & CHARTER § 26-408(b)(1) (1993). Section 26-408(b)(1) provides in pertinent part:

> The landlord seeks in good faith to recover possession of a housing accommodation because of immediate and compelling necessity for his or her own personal use and occupancy or for the use and occupancy of his or her immediate family provided, however, that this subdivision shall not apply where a member of the household lawfully occupying the housing accommodation is sixty-two years of age or older, has been a tenant in a housing accommodation in that building for twenty years or more, or has an impairment which results from anatomical, physiological or psychological conditions.

Id.; *see also* N.Y. COMP. CODES R. & REGS. tit. 9, § 2204.5(a) (1987). The rules and regulations of New York State provide language similar to that of the New York City Administrative Code without any substantial deviation.

44. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); N.Y. CONST. art. I, § 7(a) ("Private property shall not be taken for public use without just compensation.").

45. U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

taking of property without just compensation, and that the due process and involuntary servitude claims were frivolous.[46]

In November, 1983, plaintiff Joan Dawson purchased a five story brownstone in Manhattan which housed two rent-controlled tenants.[47] Both tenants have lived in the building since 1970.[48] At the time of the purchase, both tenants could have been evicted for the landlord's personal use or that of her family, so long as an immediate and compelling need was demonstrated in good faith.[49]

In 1984, the eviction provisions of the rent control laws regarding owner-occupancy evictions were amended to prohibit tenants from being displaced who are disabled, age sixty-two or older, or have been living twenty or more years in the building.[50] The plaintiff, Joan Dawson, brought this action against both New York City and the Division of Housing and Community Renewal, which administers New York City's rent-control regulations.[51] It was asserted by the plaintiff that the bar to eviction was a regulatory taking of property without just compensation, violative of both State and Federal Constitutions.[52] It was also asserted that the bar to eviction violated the plaintiff's due process rights, and the inability of the landlord to withdraw from the rental business amounted to involuntary servitude.[53]

The court stated that the major cases that invalidated housing regulations were distinguished from the instant case by the lower court under the Takings Clause because the instant case involved a pre-existing relationship that the owner voluntarily entered into when purchasing the building.[54] The case at bar differed from

46. *Dawson*, 197 A.D.2d at 138, 610 N.Y.S.2d at 208-09.
47. *Id.* at 129-30, 610 N.Y.S.2d at 203.
48. *Id.*
49. *Id.* at 130, 610 N.Y.S.2d at 203-04.
50. *Id.* at 131, 610 N.Y.S.2d at 204.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*

cases such as *Seawall Associates v. City of New York*,[55] in which regulations were held to be a physical taking, forcing owners to accept people as tenants, and denying owners the right to exclude, an essential right of private property ownership.[56] Forcing a property owner to accept strangers on the property is different than protecting existing tenants, as was held in the instant case.

The court also cited *Loretto v. Teleprompter Manhattan CATV Corp.*,[57] where the United States Supreme Court stated that even a small physical invasion of property, relative to the size of the property, was still a physical taking.[58] The *Loretto* Court stated that while the state has the right under eminent domain to take private property, or delegate such a taking to an agency or third party, it must pay a reasonable price for the property in order to comply with both the Federal and State Constitutions.[59] In another major case distinguished from the instant case by the lower court, *Armstrong v. United States*,[60] the Supreme Court held that the Fifth Amendment's guarantee prohibiting the government from taking property without just compensation was created in order to restrain the government from "forcing some

55. 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542 (1989). In *Seawall*, plaintiffs challenged a local law "as an unconstitutional taking of private property without just compensation." *Id.* at 99, 542 N.E.2d at 1061, 544 N.Y.S.2d at 544. The owners of single-room occupancy [hereinafter SRO] properties were required to repair and offer for rent all vacant units or pay penalties up to $150,000 per unit. *Id.* at 100, 542 N.E.2d at 1061, 544 N.Y.S.2d at 544. Many SRO's were purchased with the intent to demolish them and build other structures, and the City of New York attempted to force the owners to rent them by issuing heavy fines for warehousing, as well as ordering a moratorium on SRO demolitions. *Id.* at 99-101, 542 N.E.2d at 1061-62, 544 N.Y.S.2d at 544-45. The exceptions to these regulations were cases of extreme hardship, or by paying a $45,000 per unit buyout to the city. *Id.* at 100-01, 542 N.E.2d at 1061, 544 N.Y.S.2d at 545.

56. *Id.* at 102, 542 N.E.2d at 1063, 74 N.Y.S.2d at 546.

57. 458 U.S. 419 (1982).

58. *Id.* at 436-37 (stating that "[c]onstitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied").

59. *Id.* at 441.

60. 364 U.S. 40 (1960).

people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[61]

The plaintiffs, in part, claimed "that the challenged regulations frustrate their reasonable investment-back expectation of being able to evict their tenants."[62] In *Birnbaum v. State*,[63] the court held a requirement that a nursing home give the Commissioner of Health ninety days notice of its intention to close, and the written approval of such intention, did not constitute a taking of property even though the nursing home operated at a loss.[64] The plaintiff, who brought the action as executor of the Birnbaum estate to protect its assets, argued that forcing the operator to continue operations at a loss depleted the assets of the estate.[65] Justice Holmes in *Brooks-Scanlon Co. v. Railroad Commission of Louisiana*,[66] stated that the Fifth Amendment's Takings Clause means that one "cannot be compelled to carry on even a branch of a business at a loss, much less the whole business."[67] That rationale, however, was rejected in *Birnbaum* because it was not a *per se* taking in an industry subject to extensive regulation, and an administrative procedure is in existence to terminate the business in an orderly fashion for the benefit of the public.[68] The operators could not be forced to lose money indefinitely.[69] The rent control regulations in the instant case did not force the owners to operate at a loss. The court pointed out that plaintiffs have not "given any hint as to the economic impact of the regulations on their property."[70] Moreover, there is a requirement in the statute that the landlords make a reasonable

61. *Id.* at 49. The Supreme Court has held that the Fifth Amendment's guarantee is applicable to the states via the Fourteenth Amendment. B. & Q. R.R. v. Chicago, 166 U.S. 226, 236 (1897).

62. *Dawson*, 197 A.D.2d at 136, 610 N.Y.S.2d at 207.

63. 73 N.Y.2d 638, 541 N.E.2d 23, 543 N.Y.S.2d 23 (1989).

64. *Id.* at 647, 541 N.E.2d at 27, 543 N.Y.S.2d at 27.

65. *Id.* at 641-42, 541 N.E.2d at 24, 543 N.Y.S.2d at 24.

66. 251 U.S. 396 (1920).

67. *Id.* at 399.

68. *Birnbaum*, 73 N.Y.2d at 648, 541 N.E.2d at 28, 543 N.Y.S.2d at 28.

69. *Id.*

70. *Dawson*, 197 A.D.2d at 137, 610 N.Y.S.2d at 208.

rate of return (8.5%) and can apply to have the rents raised if they can show necessity.[71]

In its analysis, the *Dawson* court also noted the case of *Rent Stabilization Ass'n of New York City, Inc. v. Higgins*,[72] where the landlords claimed that the enlargement of the class of people defined as family members eligible for rent-control protection constituted a physical taking of their property because the newly defined extended family members might be strangers.[73] It was claimed that this created a perpetual tenancy.[74] The New York Court of Appeals rejected both assertions because the extended family member had to live at the premises for a period of time prior to the original tenant vacating, and also noted that an indefinite tenancy is not a perpetual one.[75]

Whether a regulation creates a perpetual tenancy that constitutes a taking has been brought before the courts on several occasions.[76] In *Yee v. City of Escondido*,[77] the Supreme Court noted, in dicta, that if a landowner was compelled to provide a perpetual tenancy, the constitutionality of the statute should be questioned.[78] The *Dawson* court distinguished *Yee* because, in the instant case, the regulations did not force a landlord to remain in perpetuity in the rental market.[79] The court noted that the plaintiff could sell her property at any time, and that she had

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71. *Id.* at 130-31, 610 N.Y.S.2d at 203-04.

72. 83 N.Y.2d 156, 630 N.E.2d 626, 608 N.Y.S.2d 930 (1993).

73. *Id.* at 171, 630 N.E.2d at 632, 608 N.Y.S.2d at 936.

74. *Id.* at 171-72, 630 N.E.2d at 632, 608 N.Y.S.2d at 936.

75. *Id.* at 171-73, 630 N.E.2d at 632-33, 608 N.Y.S.2d at 936-37.

76. *See, e.g.*, People *ex rel.* Durham Realty Corp. v. La Fetra, 230 N.Y. 429, 130 N.E. 601 (1921) (dismissing a perpetual tenancy claim because the "September housing laws" passed in 1920 were only a temporary two year regulation); Sobel v. Higgins, 188 A.D.2d 286, 590 N.Y.S.2d 883 (1st Dep't 1992) (rejecting an assertion that a statutory protection of residents who had occupied their apartments for 20 years or more constituted a perpetual tenancy because the property was purchased with rent-controlled tenants occupying the premises).

77. 112 S. Ct. 1522 (1992).

78. *Dawson*, 197 A.D.2d at 133-34, 610 N.Y.S.2d at 206.

79. *Id.* at 134, 610 N.Y.S.2d at 206.

purchased the property knowing that it was subject to regulation.[80]

On both the federal and state level there have been various landlord-tenant cases affirming the right to regulate housing. In *Pennell v. City of San Jose*,[81] the Supreme Court noted that "'[s]tates have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulations entails.'"[82] In *Bowles v. Willingham*,[83] the Court upheld a wartime restriction on the price of rental housing where defense activities created a sharp increase in demand that resulted in large rent increases.[84] The New York Court of Appeals also held, in *Spring Realty Co. v. New York City Loft Board*,[85] that protection for loft residents did not constitute a taking of landlord's property.[86]

There could also be a regulatory taking of property requiring just compensation. This occurs when governmental restrictions on property prohibit the owner from realizing any viable use of the property. In *Pennsylvania Coal Co. v. Mahon*,[87] the United States Supreme Court held that if a regulation goes too far, the action of the government will be treated as a taking and will demand just compensation.[88] The Supreme Court also noted, in *United States v. General Motors Corp*,[89] that governmental action not reaching the level of acquisition or occupation will result in a taking provided that the effect of the government's actions "are so complete as to deprive the owner of all or most of his interest in the property."[90]

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80. *Id.* at 138-39, 610 N.Y.S.2d at 208-09.

81. 485 U.S. 1 (1988).

82. *Id.* at 12 n.6 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440 (1982)).

83. 321 U.S. 503 (1944).

84. *Id.* at 514-16.

85. 69 N.Y.2d 657, 503 N.E.2d 1367, 511 N.Y.S.2d 830 (1986).

86. *Id.* at 659, 503 N.E.2d at 1368, 511 N.Y.S.2d at 831.

87. 260 U.S. 393 (1922).

88. *Id.* at 415.

89. 323 U.S. 373 (1945).

90. *Id.* at 378.

In *de St. Aubin v. Flacke*,[91] the New York Court of Appeals affirmed the notion that a taking can occur by restrictions on use, but noted that state regulations carry a strong presumption of constitutionality and that every element of the petitioner's claim must be proved beyond a reasonable doubt.[92] The regulations are otherwise justified if they are rationally "related to the public health, safety and welfare and are not confiscatory."[93] The court also noted that even a substantial diminution in the value of the property does not, by itself, present prime facie evidence of a taking of property.[94] In the instant case, the *Dawson* court stated that plaintiffs had failed to meet the *de St. Aubin* burden.[95]

In holding the plaintiff's involuntary servitude claim to be frivolous,[96] the court cited to *Sobel v. Higgins*,[97] where a landlord claimed that the rent-control eviction provisions forced a landlord to remain in the housing market, and were thus, a form of involuntary servitude.[98] Analogous to the case at bar, since the plaintiff had voluntarily purchased the property with existing tenants on the premises and could choose to sell the property at

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91. 68 N.Y.2d 66, 496 N.E.2d 879, 505 N.Y.S.2d 859 (1986).

92. *Id.* at 76, 496 N.E.2d at 885, 505 N.Y.S.2d at 865.

93. *Id.*

94. *Id.* at 76-77, 496 N.E.2d at 885, 505 N.Y.S.2d at 865. *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915) (stating that an 87% diminution in property value did not create a presumption of a taking of property).

95. *Dawson*, 197 A.D.2d at 136, 610 N.Y.S.2d at 207. The *Dawson* court cited Keystone Bituminous Coal Ass'n v. Debenedictis, 480 U.S. 470 (1987), as an illustration of a case where government action was claimed to be a regulatory taking, but similar to the instant case, was determined not to be a regulatory taking. *Dawson*, 197 A.D.2d at 135, 610 N.Y.S.2d at 207. In *Keystone*, a Pennsylvania regulation required that 50% of the coal could not be mined beneath structures identified by the statute to prevent cave-ins in the interest of health and safety of the public. *Keystone*, 480 U.S. at 470. The Supreme Court held that the regulations were not a taking, and compared the restriction on mining to other zoning ordinances which limit the owner's profitability of some of their property. *Id.* at 498.

96. *Dawson*, 197 A.D.2d at 138, 610 N.Y.S.2d at 208-09.

97. 188 A.D.2d 286, 590 N.Y.S.2d 883 (1st Dep't 1992).

98. *Id.* at 287, 590 N.Y.S.2d at 885.

any time if she wished to leave the housing business, the claim was deemed frivolous.[99]

The court also held that the due process claim was frivolous because rent-control regulations concerning evictions are within the scope of the state's permissible police powers.[100] Such regulations are economic and, therefore, the legitimate state interest of preserving affordable housing, and stopping the devastating displacement of elderly, disabled, and long-term (twenty years or more) tenants rationally relates the law to that interest.[101]

In the case of *Loab Estates, Inc. v. Druhe*,[102] a temporary restraint on landlords prohibiting them from demolishing rental buildings with existing tenants or forcing them to find the tenants comparable housing at their current rent was held not to be a violation of the landlord's due process rights because the state police powers were used to alleviate an emergency situation and the restraint was not permanent.[103]

In *Rochester Gas & Electric Corp. v. Public Service Commission of New York*,[104] a law requiring the utility to transport gas purchased by the customer, which was not from the utility's normal source, depriving the company of the customary mark-up in price as a "middle-man," did not violate the due process rights of the utility.[105] They were allowed to charge a reasonable rate for transporting the gas, and only had to provide for such transport when it was not burdening the utility or other rate payers.[106] The legislation was economic and was rationally

99. *Id.* at 287-88, 590 N.Y.S.2d at 885. *See* Recknagel v. Finkelstein, 275 A.D.2d 684, 86 N.Y.S.2d 611 (2d Dep't 1949) (stating that a landlord's involuntary servitude assertion concerning rent regulations was without merit).

100. *Dawson*, 197 A.D.2d at 138, 610 N.Y.S.2d at 209.

101. *Id.* at 138, 610 N.Y.S.2d at 208.

102. 300 N.Y. 176, 90 N.E.2d 25 (1949).

103. *Id.* at 180, 90 N.E.2d at 26.

104. 71 N.Y.2d 313, 520 N.E.2d 528, 525 N.Y.S.2d 809 (1988).

105. *Id.* at 323-25, 520 N.E.2d at 532-34, 525 N.Y.S.2d at 814-15.

106. *Id.* at 324-25, 520 N.E.2d at 533-34, 525 N.Y.S.2d at 814-15.

related to a legitimate state interest of allowing the development of New York State natural gas sources.[107]

Therefore, under both the New York Constitution and the United States Constitution, housing regulations barring evictions of long-term, disabled or elderly tenants do not constitute a taking of property without just compensation. The regulations neither violate due process nor compel a landlord to perform involuntary servitude.

107. *Id.* at 321-22, 520 N.E.2d at 531-32, 525 N.Y.S.2d at 812-13.