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Due Process

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SUPREME COURT
MONROE COUNTY

Masi Management Inc. v. Town of Ogden[1]
(decided February 25, 1999)

Plaintiff, Masi Management, Inc., claimed that the Town of Ogden violated its property rights, under substantive due process, as well as its equal protection rights, as is guaranteed by 42 U.S.C. §1983[2], the United States[3] and New York State Constitutions[4], when the Town approved a competing housing developer's subdivision proposal over plaintiff's. The Supreme Court, Monroe County, granted defendant, Town of Ogden's, motion to dismiss under CPLR 3211(a)7.[5] The court held that Masi Management's substantive due process claim was not ripe for review and that the suit was not cognizable under the state due process provision because plaintiff did not prove that it had a legitimate claim of entitlement to the property rights asserted.[6] Regarding the equal protection claims, these were dismissed because the court found the plaintiff not similarly situated with the competing developer.

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[1] 691 N.Y.S.2d 706 (Sup. Ct. Monroe County 1999).

[2] 42 U.S.C. § 1983 states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, other proper proceeding for redress . . . .

Id.

[3] U.S. CONST. amend XIV, sec. 1, which states in pertinent part: "[n]or shall any State deprive any person of life, liberty, or property, without due process of law . . . . "

[4] N.Y. CONST. art I., § 6, which states in pertinent part: "[N]o person shall be deprived of life, liberty or property without due process of law."

[5] N.Y. C.P.L.R. 3211 (McKinney 1999) states in pertinent part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: . . . 7. The pleading fails to state a cause of action . . . . " *Id.*

[6] *Masi*, 691 N.Y.S.2d at 714.

Furthermore, no bad faith or malice was established as a result of the competing developer being favored and represented by a town council member's spouse.[7]

Masi Management is a housing developer in the Town of Ogden who, in the Spring of 1997, submitted a proposal to the Town Planning Board for a senior citizen housing development on property that was zoned R-2 to permit duplex housing.[8] Plaintiff asserts that, at the Town's urging, plaintiff discarded these plans, and instead submitted a proposal in August 1997 for single-family and free-standing patio homes; this second proposal did not include any duplex housing.[9] Later, competing developer Michael LoPresti submitted a proposal for senior citizen housing; and upon determining that the Town actually preferred this proposal, Masi withdrew its August 1997 proposal and submitted one that did contain a duplex subdivision, along with some minor sections that called for uses not permitted by the zoning districts.[10] The Town rejected plaintiff's proposal, and plaintiff consequently brought suit pursuant to 42 U.S.C. § 1983, alleging that the Town caused it to expend effort and money in presenting its application, which they never intended to approve from the outset.[11]

The Supreme Court of Monroe County discussed the first and third causes of action of the plaintiff together, because these dealt with substantive due process under federal and state law, respectively.[12] The second and fourth causes of action were likewise discussed together, since they dealt with equal protection under federal and state law.[13] The Monroe County Court dismissed the plaintiff's substantive due process claim,[14] having focused its analysis primarily on the federal constitutional claim because the state due process jurisprudence does not cover the particular

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[7] *Id.* at 723.
[8] *Id.* at 709.
[9] *Id.* at 709-10.
[10] *Masi*, 691 N.Y.S.2d at 709-10.
[11] *Id.* at 709.
[12] *Id.* at 710-11.
[13] *Id.* at 718.
[14] *Id.* at 716-17.

circumstances of the case at bar.[15] Plaintiff's equal protection claims were likewise dismissed.[16]

According to current jurisprudence that has interpreted the Fourteenth amendment of the Federal constitution, to bring forth a substantive due process claim a plaintiff must assert a legitimate claim of entitlement to a property interest.[17] Plaintiff advanced two theories of entitlement, both of which the court rejected. Plaintiff's first theory posited that plaintiff was entitled to positive consideration of its large-lot single-family patio home project, which the defendants had said they preferred.[18] Instead, defendants delayed their consideration until a competing developer submitted his plans, which they accepted.[19]

The court granted favorable assumptions to plaintiff – it assumed that defendants were not allowed to delay consideration of plaintiff's proposal and plaintiff was entitled to the zoning changes that would have to result.[20] Nevertheless, the court ruled that plaintiff failed to make out a 42 U.S.C. §1983 claim because the plaintiff abandoned its proposal before an issuing agency had the chance to render a final decision. Thus, the claim was not ripe for review.[21]

The court cited *Covington Court, Ltd. v. Village of Oak Brook,*[22] whose facts were very similar to this case. The Seventh Circuit in *Covington* did not allow plaintiff to prevail on his federal due process claims because he did not avail himself of all state court remedies.[23] The court in *Masi* also relied on *Orange Lake Associates, Inc. v. Kirkpatrick*[24] which held that "a substantive due process claim is not ripe for review absent the rendering of a final decision by the governmental entity."[25]

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[15] *Masi*, 691 N.Y.S.2d at 711.
[16] *Id.* at 723.
[17] Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).
[18] *Masi*, 691 N.Y.S.2d at 711.
[19] *Id.* at 712.
[20] *Id.* at 714.
[21] *Id.* at 714-15.
[22] 77 F.3d 177 (7th Cir. 1996).
[23] *Id.* at 179-80.
[24] 21 F.3d 1214 (2nd Cir. 1994).
[25] *Id.* at 1225.

For similar reasons as above, the Supreme Court of Monroe County also rejected plaintiff's second theory of entitlement in advancing its federal due process claim. Under this theory, plaintiff claimed "equitable estoppel."[26] Specifically, plaintiff contended that it was entitled to the existing R-2 zoning classification that would accommodate its original proposal for two-family duplexes but because the Town Board delayed consideration of this proposal, the town prevented plaintiff's property interest from vesting.[27] Plaintiff claims the town delayed consideration of its proposal long enough to enact amendments to the zoning ordinance that enabled the competing proposal by developer LoPresti to be accepted over plaintiff's.[28] The court rejects this claim because, unlike the first theory, in this case plaintiff never submitted a proposal for two-family duplexes.[29] Since plaintiff did not follow the process through to its end, his claim is yet again not ripe for review: "The court has found no case which has sustained an inchoate substantive due process claim use claim of this sort."[30]

However, the court again gives plaintiff the benefit of the doubt, by supposing *arguendo* that plaintiff's proposal was submitted and denied.[31] Nevertheless, the court still rejected Plaintiff's second theory because it is not certain that this interest in fact would have vested.[32] Hence, a delay by the zoning board would not be a

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[26] *Masi*, 691 N.Y.S.2d at 712. *See also* DLC Management Corp. v. Town of Hyde Park, 163 F.3d 124 (2nd Cir. 1998). "In instances in which construction has been improperly delayed by town officials in an attempt to prevent vesting, the right to an existing zoning status may also vest by equitable estoppel." *Id.* at 130-31.

[27] *Masi*, 691 N.Y.S.2d at 712 (noting that

> [D]efendants, by means of securing an agreement to delay consideration of the project and setting plaintiff off on another course, induced plaintiff to believe that the alternative project for large-lot single-family and patio homes would be approved under a change in the zoning law that, for a long time, defendants wanted to enact anyway).

[28] *Id.*

[29] *Id.*

[30] *Masi*, 691 N.Y.S.2d at 712..

[31] *Id.*

[32] *Id.* at 712-714.

violation of plaintiff's substantive due process rights if vesting could not have occurred despite the absence of the delay. The court's reasoning is that under Town Law §§ 276 and 277, the Planning Board has wide discretion to approve or deny a subdivision plat.[33] As a result, approval is not guaranteed, and this will "preclude a claim of entitlement sufficient to create a property interest cognizable under the substantive due process doctrine."[34]

According to the court, plaintiff is unsuccessful because it is trying to put the cart before the horse. Masi Management is asserting arbitrary conduct by the Town Planning Board without having proven the threshold issue of whether it, plaintiff, has a legitimate claim of entitlement to the property interest.[35] For its analysis, the court relies heavily on the Second Circuit federal case of *Zahra v. Town of Southold*.[36] This case advocated a "strict entitlement" test[37] and stands for the proposition that matters of local concern, especially land-use disputes, should be handled by local government.[38]

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[33] *Id.* at 714. *See* N.Y. TOWN LAW §§ 276 and 277 (McKinney 1998).

[34] *Id. See also* Honess 52 Corp. v. Town of Fishkill, 1 F. Supp.2d 294, 304 (S.D.N.Y. 1998).

[35] *Masi*, 691 N.Y.S.2d at 715.

[36] 48 F.3d 674 (2nd Cir. 1995).

[37] *Id.* at 680. The court noted that it

> [u]ses a strict 'entitlement' test to determine whether a party's interest in land-use regulation is protectible under the Fourteenth Amendment (citations omitted). This inquiry stems from the view that a property interest can sometimes exist in what is sought – in addition to the property interest that exists in what is owned – provided there is a 'legitimate claim of entitlement' to the benefit in question (citations omitted).

Id.

[38] *Id. Zahra* states:

> [D]ecisions on matters of local concern should ordinarily be made by those whom local residents select to represent them in municipal government – not by federal courts . . . . The Due Process Clause does not function as a general overseer of arbitrariness in state and local land-use decisions; in our federal system, that is the province of state courts.

Id.

Plaintiff, on its behalf, put forth decisions from the Third Circuit where the strict entitlement test was not applied.[39] This was an attempt by plaintiff to show that the Second Circuit also need not apply a strict entitlement test. The court however summarily rejected this,[40] and cited the dissenting opinion in another Third Circuit case that disagreed with the above philosophy.[41] In any event, the court relied on and felt bound by the prevailing view in the state, which is to follow the legitimate claim of entitlement test.[42] Consequently, a showing that defendants may have acted improperly will not be sufficient, on its own, to make out a substantive due process claim if the entitlement aspect has not been proven.[43]

With regard to plaintiff's substantive due process claim under the New York State Constitution, the court ruled that plaintiff's claim would receive no broader consideration under state law.[44] This is because the New York Court of Appeals has not provided a clear, unambiguous rule on the issue. In two cases, namely *Sharrock v. Dell Buick-Cadillac*[45] and *Cooper v. Morin*,[46] the Court of Appeals interpreted the state due process guarantee as broader

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[39] *See* DeBlasio v. Zoning Bd. of Adjustment for Tp. of West Amwell, 53 F.3d 592, 600-01 (3rd Cir. 1995) (holding that ownership alone establishes a cognizable property interest and plaintiff would simply have to show that Board acted arbitrarily or irrationally). "We are less certain that the 'legitimate claim of entitlement' approach is mandated by Supreme Court jurisprudence." *Id.*, fn. 9 at 601.

[40] *Masi*, 691 N.Y.S.2d at 717.

[41] Phillips v. Borough of Keyport, 107 F.3d 164 (3rd Cir. 1997). Judge Alito, in dissent, argued that Bello v. Walker, 840 F.2d 1124 (1988) and its progeny (which includes *DeBlasio*) were wrongly decided and "based on a misreading of Supreme Court precedent." (Alito, J. dissenting in part). *Id.* at 184.

[42] *Masi*, 691 N.Y.S.2d at 717. For § 1983 decisions that followed this formulation, *see, e.g.*, Town of Orangetown v. Magee, 88 N.Y.2d 41, 52-3, 665 N.E.2d 1061, 1067-8, 643 N.Y.S.2d 21, 27-28 (1996); *see also* Matter of Twin Town Little League, Inc. v. Town of Poestenkill, 249 A.D.2d 811, 812, 671 N.Y.S.2d 831, 833 (1998); and Reed's of Armonk Bldg. Supply, Inc. v. Curry, 246 A.D.2d 587, 667 N.Y.S.2d 302 (1998).

[43] *See supra* note 14 and accompanying text.

[44] *Masi*, 691 N.Y.S.2d at 717.

[45] 45 N.Y.2d 152, 379 N.E.2d 1169, 408 N.Y.S.2d 39 (1978).

[46] 49 N.Y.2d 69, 399 N.E.2d 1188, 424 N.Y.S.2d 168 (1979).

than that of the federal.[47] In *Sharrock*, the court rejected the notion that state action was required in the context of a procedural due process claim.[48] In *Cooper*, the court held that a pretrial detainee was entitled to contact visitation as a matter of State, but not Federal, constitutional law.[49] In other cases, the court refused to extend the reach of the state due process clause.[50] As a result, the *Masi* court was hesitant to announce a new constitutional rule.[51] Additionally, since a state administrative remedy was available (Article 78-mandamus), which plaintiff did not utilize before bringing its state constitutional claim, the claim would probably not have been ripe.

The second and fourth causes of action advanced by plaintiff involved equal protection under Federal[52] and State law.[53] The court evaluated the two claims together because it determined the analysis of an equal protection claim under federal and state law to be identical.[54]

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[47] *Masi*, 691 N.Y.S.2d at 717. *See also* People v. Van Pelt, 76 N.Y.2d 156, 556 N.E.2d 423, 556 N.Y.S.2d 984 (1990), where the Court of Appeals found that the state due process provision conferred a more protective benefit than its federal counterpart with respect to enhanced sentencing following a successful appeal, retrial, and reconviction. *Id.* at 162, 556 N.E.2d at 426, 556 N.Y.S.2d at 987.

[48] *Sharrock*, 45 N.Y.2d at 159-60, 379 N.E.2d 1169, 1173-4, 408 N.Y.S.2d 39, 44. "On innumerable occasions this court has given our State Constitution an independent construction, affording the rights and liberties of the citizens of this State even more protection than may be secured under the United States Constitution." *Id.* at 159.

[49] *Cooper*, 49 N.Y.2d at 73, 399 N.E.2d 1188, 1190, 424 N.Y.S.2d 168, 170-71. *Cooper*, however, has been used as support in numerous dissenting opinions rather than majority ones.

[50] *Masi*, 691 N.Y.S.2d at 717. *See, e.g.*, People v. Alvarez, 70 N.Y.2d 375, 379-80, 515 N.E.2d 898, 900, 521 N.Y.S.2d 212, 214 (1987), and People v. Kohl, 72 N.Y.2d 191, 197, 527 N.E.2d 1182, 1185, 532 N.Y.S.2d 45, 48 (1988).

[51] *Masi*, 691 N.Y.S.2d at 717.

[52] U.S. CONST. amend. XIV, §1, which states in pertinent part: "[Nor] shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."

[53] N.Y. CONST. art I, § 11 This section provides in pertinent part: "No person shall be denied equal protection under the laws of this state . . . ." *Id.*

[54] *See supra* note 13 and accompanying text..

The essence of an equal protection analysis is that those individuals who are similarly situated should be treated similarly.[55] The prevailing case law regarding making a claim for violation of equal protection based on illegal discrimination comes from *Washington v. Davis,*[56] even though it has been cited in many dissenting and concurring opinions. There, the United States Supreme Court held that where a law is not discriminatory on its face, plaintiffs have to show purposeful discrimination by defendants in order to demonstrate an equal protection violation.[57] Since the zoning codes in this case were not facially discriminatory, plaintiff had to show that the codes were selectively enforced in violation of federal and state law.[58]

The elements of a violation of equal protection by selective enforcement are: 1) the person compared with others similarly situated, was selectively treated; and 2) that 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.[59] The court found that the zoning codes were not selectively enforced because plaintiff was, in fact, not similarly situated with the competing developer.[60] Because plaintiff withdrew its original plans for large-lot, single-family, patio homes, plaintiff was no longer similarly situated with LoPresti, especially once plaintiff

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[55] *See* City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439 (1985).

[56] 426 U.S. 229 (1976).

[57] *Id.* at 239. *See also* Snowden v. Hughes, 321 U.S. 1(1944) stating:

> The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.

Id. at 8.

[58] *Masi*, 691 N.Y.S.2d at 718.

[59] LaTrieste Restaurant and Cabaret Inc. v. Village of Port Chester, 40 F.3d 587, 590 (2nd Cir. 1994).

[60] *Masi*, 691 N.Y.S. at 718-19.

submitted its revised proposal for two-family duplexes.[61] Hence, the two developers do not even share commonalities, which is a lower threshold than having to be identical.[62] Furthermore, plaintiff's allegations in its complaint makes an effort to point out the differences in the two developer's proposals.[63]

Additionally, assuming that plaintiff and LoPresti were similarly situated, the court found that plaintiff did not prove the element that the defendants treated plaintiff differently based on impermissible classifications or maliciously or in bad faith.[64] There is a split in the circuits as to whether a showing of just malicious or bad faith intent to injure is enough to support an equal protection claim or whether it also must be shown that this malicious action was to punish an exercise of constitutional rights.[65] The Second Circuit courts support the former postulation,[66] whereas the Sixth and Seventh Circuits subscribe to the latter view.[67] The Supreme Court has yet to explicitly recognize the former postulation.

Likewise, the New York Court of Appeals has not yet settled the question.[68] The Court of Appeals has adopted the following formulation regarding selective enforcement within equal protection analysis: "there must be not only a showing that the law was not applied to others similarly situated but also that the selective application of the law was deliberately based upon an impermissible standard such as race, religion or some other

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[61] *Id.*

[62] *See* Betts v. McCaughtry, 827 F.Supp. 1400, 1405 (W.D.Wis 1993) (holding that those similarly situated need not be identical in makeup - sharing commonalities can merit similar treatment).

[63] *Masi*, 691 N.Y.S.2d at 719.

[64] *Id.* at 720.

[65] *Id.*

[66] *See* FSK Drug Corp. v. Perales, 960 F.2d 6, 10 (2nd Cir. 1992); Zahra v. Town of Southold, 48 F.3d 674, 683-4 (2nd Cir. 1995); and Snowden v. Hughes, 321 U.S. 1, 8 (2nd Cir. 1944).

[67] *See, e.g.*, Futernick v. Sumpter Tp., 78 F.3d 1051, 1058 (6th Cir. 1996); *see also* Olech v. Village of Willowbrook, 160 F.3d 386, 387 (7th Cir. 1998); *see also* Esmail v. Macrane, 53 F.3d 176, 178 (7th Cir 1995).

[68] *Masi*, 691 N.Y.S.2d at 721.

arbitrary classifications."[69] The court in *Masi* reasoned that the fact the Court of Appeals made reference to "classification" in its formulation indicates that it "has yet to consider whether non-class-based individual discrimination is sufficient to state a selective enforcement claim under Supreme Court precedents."[70] As a result, the *Masi* court refused to overstep its bounds yet again and held that allegations of different treatment alone will not be enough to allege malice or bad faith intent to injure.[71] Consequently, the court found that plaintiff did not show that it was maliciously singled out,[72] because even political motivation of the kind involved in this case will not be considered malice within the meaning of the selective enforcement rule.[73] The court cited *Cordeco Development Corp. v Santiago Vasquez,*[74] to support its reasoning; but it is navigating a slippery slope, since in *Cordeco* political motivation to favor another developer *was* held to be enough to support an equal protection claim.[75] However, the court relied on the fact that this issue was not challenged below[76] and thus, the "federal basis for liability was never expressly litigated."[77]

It appears then that under *Masi Management v. Town of Ogden* and prior case law, a substantive due process claim under federal and state law more often than not will be analyzed similarly, since an analysis under the state constitution has yet to unambiguously call for a different standard or interpretation. The New York Court

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[69] *People v Blount*, 90 N.Y.2d 998, 999, 688 N.E.2d 500, 665 N.Y.S.2d 626 (1997).

[70] *Masi,* 691 N.Y.S.2d at 721 n. 3.

[71] *Id.* at 721. *See also* Indiana State Teachers Ass'n v. Board of School Com'rs of the City of Indianapolis, 101 F.3d 1179, where the Court states that allowing a loser in a contest to appeal on grounds that the decision was arbitrary, treating likes as unlike and resulting in an equal protection violation "would constitutionalize the Administrative Procedure Act." *Id.* at 1181,

[72] *See supra* note 7.

[73] *Id.* at 722.

[74] 539 F.2d 256 (1st Cir. 1976).

[75] *Id.* at 260.

[76] *Id.*, fn. 5.

[77] Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 832 (1st Cir. 1982).

of Appeals still has not rendered a decision on whether the State's interpretation of its due process clause in relation to the federal interpretation will, in general, be broader, narrower, or the same. However, there is currently no danger that there will be a divergence in the way equal protection claims will be analyzed under Federal and State law: they are similarly situated – even to the extent that both are not settled as to how to treat non-class-based discrimination.

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