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United States District Court, E.D. Pennsylvania.
LARA, INC.
v.
SOUTH WHITEHALL TOWNSHIP, et al.
CIV. A. No. 88-8138.

March 14, 1989.

Frank S. Poswistilo, Thomas R. Elliott, Jr., Charles W. Elliott, Brose and Poswistilo, Easton, Pa., for plaintiff.

Blake C. Marles, Thomas H. Dinkelacker, Weaver Mosebach Piosa Hixson, Wallitsch & Marles, Allentown, Pa., for E. Lichtenwalner & Ronnie Rice, South Whitehall Twsp., Steven Okun, & Elwood Bernhard & Charles Mackenzie.

Herbert M. Rafner, Richard F. Stevens, Butz Hudders Tallman Stevens & Johnson, Allentown, Pa., for Dorney Park Coaster Co., Inc.

MEMORANDUM AND ORDER

HUYETT, District Judge.

*1 Plaintiff was the operator of stock car and “midget car” races under an agreement with defendant Dorney Park Coaster Co., Inc. (“Dorney Park”), who owned the land on which the races were held. As further discussed below, Dorney Park terminated that agreement in the fall of 1986, pursuant to an agreement made with the other defendants, South Whitehall Township, the Township Commissioners,^{FN1} and the Township Secretary (collectively, “Township defendants”). The agreement to cease auto racing at the park was reached between the Township defendants and Dorney Park as part of the settlement of litigation brought by the Township against Dorney Park concerning the payment of amusement tax revenues.

Plaintiff claims the agreement between the Township defendants and Dorney Park illegally deprives plaintiff of its liberty and property rights under the due process clause of the fourteenth amendment to the United States Constitution, in violation of [42 U.S.C. § 1983](#). In three separate, but precisely the same, motions, the Township defendants move pursuant to [Fed.R.Civ.P. 12\(b\)\(1\) and \(6\)](#) to dismiss the complaint. For the reasons stated below, I shall deny the motions to dismiss with the exception of the motion of the Township to dismiss the tortious interference with contract claim.

I.

According to the complaint, the facts giving rise to this action are as follows: Plaintiff Lara, Inc. (“Lara”) is a Pennsylvania corporation. Since 1960, Lara or its predecessor have operated automobile races at a one fifth mile race track located on property owned by Dorney Park in South Whitehall Township. Operation of the races at Dorney Park is Lara’s sole business. Lara entered into what purports to be a License Agreement ^{FN2} with Dorney Park on April 16,

1979 which includes a provision that gives Lara the right to renew the license from year to year by simply giving Dorney Park written notice by October 15 of each successive year.

By letter dated September 8, 1986, Lara informed Dorney Park of its decision to operate races during 1987. On or about October 23, 1986, Dorney Park informed Lara that it could not renew the agreement for auto racing beyond November 1, 1986 pursuant to an agreement with the Township.

Lara subsequently learned that the “agreement” referred to in the notice of termination by Dorney Park was in fact an agreement to settle litigation concerning amusement tax revenues between Dorney Park and the Township (“settlement agreement”). The settlement agreement was signed by defendant Charles Mackenzie as Chairman of South Whitehall Township, and approved and authorized by the other Township Commissioners. After it was signed on December 9, 1985, Dorney Park and the Township had it filed under seal in the Lehigh County Court of Common Pleas. Thus, only after Lara was given notice at the end of its 1986 season that its rights to hold races was being terminated by Dorney Park did Lara learn of the existence of the settlement agreement.

*2 Thereafter, Lara sought equitable relief in the Pennsylvania courts. The procedural history of the state litigation is lengthy and complex. However, for purposes of the instant motion, the relevant detail is that the Pennsylvania courts have concluded that the agreement between Lara and Dorney Park is a revocable license under Pennsylvania law for purposes of obtaining injunctive relief.

On October 21, 1988, plaintiff filed the instant action against Dorney Park and the Township defendants. The complaint contains four counts. Count I claims that the Township defendants' conduct destroyed plaintiff's sole business activity, that plaintiff had a property interest in that activity which was destroyed by a misuse of power by the Township defendants under state law. Plaintiff claims that the settlement agreement's provisions concerning the termination of auto racing at Dorney Park deprive it of liberty and property interests without due process. Count II claims that Dorney Park acted as agent for the Township when it terminated Lara's rights under the agreement. Count III claims that the Township defendants tortiously interfered with the contract between Dorney and Lara, while count IV claims that Dorney Park's conduct constituted a breach of contract. The Township defendants move to dismiss arguing various defects in the [§ 1983](#) claim, the tortious interference claim, and that if the [§ 1983](#) claim is dismissed, I should refrain from exercising pendent jurisdiction over the state law tortious interference claim.

II.

In resolving a motion to dismiss, the court must accept as true all the well-pleaded allegations of the complaint, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable interpretation of the pleadings, the plaintiff may be entitled to relief. [Robb v. City of Philadelphia, 733 F.2d 286, 290 \(3rd Cir.1984\)](#); [Estate of Bailey by Oare v. County of York, 768 F.2d 503, 506 \(3d Cir.1985\)](#); [Helstoski v. Goldstein, 552 F.2d 564, 565 \(3d Cir.1977\)](#) (per curiam). Civil rights actions, in particular, should not be dismissed at the pleading stage “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.” [Robb, 733 F.2d at 290](#).

To establish its [§ 1983](#) claim, Lara must show “(1) that the conduct complained of was committed by a person acting under color of state law,” *id.*, which is not seriously disputed by the Township defendants in the instant motions, and “(2) that the conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.” *Id.* at 291. Under the second element, defendants argue ^{FNS} that Lara was not deprived of any property or liberty interest in operating its business because, in the state court litigation between the parties, the Pennsylvania courts have concluded that the agreement between Lara and Dorney Park constituted a revocable license under state law. The Township defendants further contend that, even if Lara were deprived of some cognizable constitutional

interest, that any action by the Township defendants was, at most, a tortious interference with prospective contractual relations between Dorney Park and plaintiff which did not deprive Lara of any procedural due process rights. Brief in Support of Motion to Dismiss, at 10-19.

*3 I turn to the Township defendants' arguments concerning the claimed "property interest." Defendants vigorously contend that since the Pennsylvania state courts have concluded that the agreement between Lara and Dorney Park constitutes a revocable license under Pennsylvania law, Lara cannot claim that it was deprived of a constitutionally cognizable property interest. I do not believe, however, that ends the inquiry. "Property," in the due process sense, has been found in a teacher's tenure contract, [Perry v. Sindermann](#), 408 U.S. 593 (1972), in a welfare recipient's rights, [Goldberg v. Kelly](#), 397 U.S. 254 (1970), and in a bar operator's interest in a liquor license, [Reed v. Village of Shorewood](#), 704 F.2d 943, 948 (7th Cir.1983). The property interests in each of these cases were not property interest under the relevant state law. Thus, I "must look behind labels, and decide whether plaintiff's license was 'property' in a functional sense [.]" *Id.*(citation omitted).

"[V]iewed functionally, property is what is securely and durably yours under state ... law, as distinct from what you hold subject to so many conditions as to make your interest meager, transitory, or uncertain." *Id.* Under this standard, it would appear that Lara held a property right in the agreement with Dorney Park. Lara and its predecessor operated auto races at Dorney Park since 1960, without any apparent interference from the Township. Based on the facts alleged in the complaint, there is no indication that Lara's renewal right was demanding; the complaint alleges the contrary, that the license was renewed annually since 1979 as a matter of course. This is not a situation in which Lara was an initial applicant for the license. *Cf. Sanderson v. Village of Greenhills*, 726 F.2d 284, 286 (6th Cir.1984); [Shamie v. City of Pontiac](#), 620 F.2d 118 (6th Cir.1980). If it were, perhaps then Lara would not have a property interest in the license. Under the facts of the complaint, therefore, Lara has alleged facts sufficient to establish a "legitimate claim of entitlement" to renewal of the license. [Sanderson](#), 726 F.2d at 286; [Reed](#), 704 F.2d at 948.

Plaintiff also argues that the Township's actions deprived it of its *substantive* due process rights. In [Bello v. Walker](#), 840 F.2d 1124, 1129 (3rd Cir.1988), after summarizing recent Supreme Court substantive due process cases, the court stated "These cases reveal that the deliberate and arbitrary use of government power violates an individual's right to substantive due process." In their reply brief, the Township defendants completely ignore the substantive due process cases cited by plaintiff, and the implications of those cases.

Lara's complaint alleges facts from which a fact finder could reasonably conclude that the Township defendants, acting in their official capacities improperly interfered with the renewal of Lara's license to operate the auto races, and that the Township defendants did so for reasons unrelated to the amusement tax litigation between Dorney Park and the Township. Further, the complaint alleges that the Township could not have prohibited the auto races through a zoning ordinance. Under the facts as alleged, the Township actions have no apparent relationship to any legitimate governmental objective related to the amusement tax litigation. I also note that the Township defendants, although not required to do so at this stage, have proffered no explanation whatsoever for why the settlement agreement included the discontinuance of auto racing at the park, and therefore, Lara's business. The allegations of the complaint, if proven, may be sufficient to establish a deprivation of a liberty interest cognizable under [section 1983](#). *Id.* at 1129-30; [Pace Resources, Inc. v. Shrewsbury Township](#), 808 F.2d 1023, 1035-36 (3rd Cir.), *cert. den.*, --- U.S. ---, 107 S.Ct. 2482 (1987); [Epstein v. Township of Whitehall](#), 693 F.Supp. 309, 314 (E.D.Pa.1988) (Township action in extorting financial concessions from developer to obtain land use permit states [§ 1983](#) claim when Township's actions are "totally unrelated" fiscal interests).

*4 Because I conclude that constitutionally protected interests are implicated, I must address what procedure was due to Lara. [Robb](#), 733 F.2d at 292. The complaint states that the Township could not have prohibited stock car races without complying "with law." Complaint, at ¶ 18. The Township defendants argue that the only remedy available to Lara was an action in the Pennsylvania courts to enjoin the denial of the renewal of the license, which occurred and

was unsuccessful. Facially it appears that defendants are correct. [Lara, Inc. v. Dorney Park Coaster Co., Inc., 542 A.2d 220 \(Pa.Comm. Ct. 1988\)](#). However, the parties apparently did not raise the issues of import here; whether the license created a constitutionally cognizable property interest, and if so, what damages may be appropriate for an unconstitutional deprivation of that interest. Further, the Commonwealth Court explicitly stated that “the tortious interference and abuse of government power issues” were to be addressed at another hearing. [Id. at 224](#). There is nothing in the present record which suggests that the other hearing ever occurred, or that these issues were addressed in the state court litigation. It appears, therefore, that plaintiff has not received a hearing on whether the settlement agreement deprived Lara of a constitutional property interest without due process, or whether the Township defendants abused their governmental power.^{FN4} Should it come to light later that the constitutional issues were properly before the state courts, the parties are free to bring that information to the court's attention at that time.^{FN5}

Turning to the state law tortious interference count, Count III, against the Township and the individual Township defendants, plaintiff does not contest the substance of the Township's claim of statutory immunity from damages for tortious interference under [42 Pa. Con. Stat. Ann. § 8541 \(Purdon\)](#), only that the defense must be raised in a responsive pleading to the complaint, not by motion to dismiss. Plaintiff's argument suggests that the [Fed. R. Civ. P. 8\(c\)](#) entirely negates [Fed. R. Civ. P. 12\(b\)\(6\)](#). Under [Rule 12\(b\)\(6\)](#), if it appears beyond doubt that the plaintiff can prove no set of facts which entitle him to judgment, a motion to dismiss should be granted. [Conley v. Gibson, 355 U.S. 41, 45-46 \(1957\)](#). That standard is met here. The Township is immune from damages for tortious interference by statute. There is no need to delay dismissing this claim with prejudice as to the Township.

Lastly, the Township defendants argue that Count III should be dismissed because it does not properly allege that they were acting with the intent to interfere with Lara's license agreement. Although the complaint does not specifically allege defendants were acting with intent, the complaint does allege that the purpose of the settlement agreement was to discontinue racing at the park. The complaint, taken as a whole, provides sufficient “notice” of the tortious interference claim under the liberal pleading regime of the Federal Rules of Civil Procedure.

*5 An appropriate order follows.

ORDER

Upon consideration of the Motions to Dismiss of (1) defendants South Whitehall Township, Steven Okun and Elwood M. Bernhard; (2) defendants Ethel F. Lichtenwalner and Ronnie J. Rice; and (3) defendant Charles E. Mackenzie, plaintiff's responses, and for the reasons stated in the foregoing memorandum,

The Motions of defendant Lichtenwalner and Rice, and Mackenzie are DENIED.

The Motion of South Whitehall Township, Okun and Bernhard is DENIED as to Count I of the complaint, DENIED as to Count III for defendants Okun and Bernhard, and GRANTED as to Count III for defendant South Whitehall Township. Count III is DISMISSED WITH PREJUDICE against defendant South Whitehall Township.

IT IS SO ORDERED.

^{FN1}. The complaint names William T. Ott as a defendant. It appears that Ott was at one time a South Whitehall Township Commissioner, and is now deceased.

^{FN2}. Lara argues in response to instant motions that this agreement was a contract or lease between it and Dorney Park. Because it appears that the Pennsylvania courts, as discussed further below, have determined that the agreement is a revocable license under Pennsylvania law, and Lara has not successfully overturned

that decision on appeal, I shall assume that the agreement is a license for purposes of the instant motions.

[FN3](#). I note that the defendants do not dispute at this time whether the conduct complained of, *i.e.*, the negotiation and adoption of the settlement agreement between Dorney Park and the Township, constitutes the “official policy” of the Township. See [Monell v. Department of Social Services, 436 U.S. 658, 690 \(1978\)](#).

[FN4](#). I note that the Commonwealth Court expressed some concern that Lara may not have received adequate procedural due process in the state trial court because the trial court unilaterally converted the preliminary injunction hearing to a final injunction proceeding. See [Lara, Inc., 542 A.2d at 223 & n. 5](#).

[FN5](#). The conclusion that the complaint alleges sufficient facts to survive a motion to dismiss is, naturally, not the end of the case. The Township defendants correctly state that [§ 1983](#) is not a mechanism for turning tortious interference with contract actions involving state actors into federal law claims. [Ohio Inns, Inc. v. Nye, 542 F.2d 673 \(6th Cir.1976\)](#). If, after discovery, it appears that plaintiff cannot prove an intentional or reckless deprivation of Lara's rights-e.g., the Township was negligently unaware of the existence of Lara's license with Dorney Park-the Township defendants may pursue summary judgment in their favor.

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Not Reported in F.Supp., 1989 WL 23079 (E.D.Pa.)

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