No. 21-1324

IN THE

Supreme Court of the United States

JOHN ZARBA; SUSAN LEMOIE-ZARBA,

Petitioners,

v.

THE TOWN OF OAK BLUFFS, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION By TOWN OF OAK BLUFFS, THOMAS PERRY, ROBERT WHRITENOUR, KRIS CHVATAL, ANDREA ROGERS, PETER YOARS, MICHAEL PERRY, LLEWELLYN ROGERS, DAVID BAILEY, AND MARK BARBADORO

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BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether this case is appropriate for certiorari review where there are no "compelling reasons" as required under Supreme Court Rule 10, including no split among the Circuit courts nor conflict with the U.S. Supreme Court, nor any important issues of federal law undecided by the Supreme Court?

2. Whether the First Circuit properly affirmed the dismissal of Plaintiff's lawsuit because it failed to state a claim for relief under 42 U.S.C. §1983 for alleged civil rights violations of procedural or substantive due process, equal protection, or taking without just compensation, arising from the denial of an occupancy permit based on a property line dispute and/or the issuance of parking citations?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

RULES:

STATEMENT OF THE CASE

I. Statement of the Facts

This lawsuit arises from Plaintiffs' ("Zarbas") construction of a "guest house" on their property at 14R South Street, Oak Bluffs, resulting in litigation between the Plaintiffs and their abutting neighbors, as well as the Town of Oak Bluffs ("Town"), concerning the use of an access road to the guest house and its conformance with the Town Zoning Bylaws.[1] See Pl. Amend. Compl. ¶¶ 13-51 (App. 23a-31a). The crux of the lawsuit is the Town withholding a final occupancy permit for the Plaintiff's guest house due to a dispute over whether the residence was constructed too close to the property line in violation of local set-back regulations. See Amend. Compl. (App. 19a). There was also a parking dispute wherein Town cited Plaintiffs for parking regulation violations. See Amend. Compl. ¶¶31, 36 (App. 26a-27a). The Plaintiffs John and Susan Zarba are owners of property at 14R South Street, Oak Bluffs, MA. See Amend. Compl. ¶1 (App. 21a). The Complaint named as Defendants the Town of Oak Bluffs, two building inspectors, the Town Administrator, three members of the Zoning Board of Appeals ("ZBA"), two associate members of the ZBA, the Town Assessor, and two Attorneys serving as Town Counsel and their law firm. See Amend. Compl. ¶¶2-10 (App. 21a-22a). Plaintiffs obtained a building permit to construct the guest house on October 13, 2015. See Amend. Compl. ¶13 (App. 23a). Plaintiffs acknowledge that on March

[1] Although Defendants dispute many of the Plaintiffs allegations, such allegations are deemed true solely for the purposes of the Motion to Dismiss under Rule 12(b)(6). See Erickson v. Pardus, 551 U.S. 89, 94 (2007).

9, 2016 they were sued in Land Court by a neighbor John C. O'Neil (the "O'Neil Trust") over O'Neil's access to what Plaintiff's call "Zarba's private way for access to their property." See Amend. Compl. ¶15 (App. 23a-24a). Plaintiffs allege they were denied a final occupancy permit by email from the Building Inspector Mr. Barbadoro on June 27, 2016. See Amend. Compl. ¶23 (App. 25a). The final occupancy permit was denied because the Town's attorney had advised the building inspector the property "may have a zoning issue" and Town counsel obtained an independent land survey which found the Plaintiffs' guest house encroached upon the property line, bordering a Town cemetery, and thus violated the setback requirements. See Amend. Compl. ¶¶23-40 (App. 25a-26a). Plaintiffs dispute the accuracy of the Town survey. Id. Plaintiffs appealed the denial of the occupancy permit to the Town ZBA, and thereafter to the Land Court. See Amend. Compl. ¶¶36-43 (App. 27a-29a).

Plaintiffs specifically allege they prevailed in their Land Court action concerning the parking violations citation wherein "Judge Piper adjudicated the Boards Parking decision and granted permission for the Zarba's to park on their property next to the guest house." See Amend. Compl. ¶50 (App. 30a). After the filing of their federal Amended Complaint, a separate Land Court judge ruled in favor of Plaintiffs as to the property line dispute, after hearing evidence during the three-day trial referenced in the Complaint. See Foster Decision (First Cir. Record App. 194). Notably, Judge Foster's conclusion concerning the boundary dispute was to disagree with both parties' land surveyors, finding "Each is a judgment of the respective surveyor, and each

judgment has both its strengths and its flaws. … Each surveyor's opinion is equally plausible and equally flawed." Id. at p. 17 (First Cir. Record App. 210). Remarkably, after reviewing all the evidence, Judge Foster found "that the southern bound of the Davis parcel remains uncertain even after hearing the testimony of [plaintiff's surveyor] Gilstad and [town surveyor] Austin and reviewing the deeds and plans on which they relied." Id. at p. 21 (First Cir. Record App. 214). Unable to rely upon either surveyor, Judge Foster relied on evidence "that there was, for many years, a metal rail fence running the entire length of the cemetery's northern edge and the Davis parcel's southern edge, separating the Davis parcel from the cemetery." Id. at p. 22 (First Cir. Record App. 215). Based on the location of this old metal fence, Judge Foster found the boundary line most consistent with Plaintiff's surveyor Mr. Gilstad, and thus found "that the southern boundary of the Zarba property is that shown for lot 2 on the Gilstad plan. Therefore, it was an error of law for the ZBA to affirm the Building Inspector's order relying on the Austin plan to find that the Zarbas' guest house was within the setback."[2] Id. at p. 25 (First Cir. Record App. 218). The Land Court reversed the ZBA and remanded, after which the ZBA complied upon remand ordering the issuance of a permanent occupancy permit. See Oak Bluffs

[2] Notably, the Land Court found no evidence of bad faith or malice when later denying Plaintiffs' Motion for Costs, reasoning that "[t]he ZBA's reliance on the Austin survey, even if it was wrong, was not so unreasonable as to constitute gross negligence. The evidence at trial or otherwise presented by the Zarbas does not support a finding that the ZBA acted in bad faith or with malice." See Order Denying Rule 54 Mot. Costs, Zarba et al. v. Chvatal, et al., Land Ct. #17MISC000139 at p. 2 (Foster, J.)(Feb. 6, 2020) (First Cir. Record App. 349).

ZBA Remand Order (Jan. 16, 2020) (First Cir. Record App. 226). While Plaintiffs prevailed in the Land Court action, their Amended Complaint explicitly recognized success in the Land Court does not establish a civil rights cause of action, asserting "[t]he outcome of this Land Court boundary dispute has no bearing on this civil rights claim against [sic] the plaintiffs." See Pl. Amend. Compl. ¶51 (emphasis added) (App. 31a).

As to the individually named Town officials the Amended Complaint names as Defendants three of the "regular members of the Zoning Board of Appeals": Kris Chvatal Chairman, Andrea Rogers, and Peter Yoars. See Amend. Compl. ¶5 (App. 22a). It also names the two "associate members" of the Zoning Board of Appeals ("ZBA"): Michael Perry and Llewellyn Rogers. See id. With the exception of Chairman Chvatal, there are no other allegations anywhere in the Complaint that any of the ZBA members took any individual actions. See Amend. Compl. (App. 19a). Thus, the Complaint alleges no individual actions by four of the Defendants: Andrea Rogers, Peter Yoars, Michael Perry or Llewellyn Rogers.[3] As for Chairman Chvatal, the only allegations of his actions were in his role as Chairman during ZBA hearings that he (1) directed other ZBA members to deny the Zarba's appeals; and (2) "read a prepared statement without any questions and/or

[3] Instead, the Amended Complaint makes oblique allegations against "the Board" or "Board members," which is equivalent to claims against the individual Board Members in their official capacity for which they cannot be held personally liable. See Hafer v. Melo, 502 U.S. 21, 25 (1991) (stating official capacity suits are tantamount to a suit against the government itself).

discussion among the Board." See Amend. Compl. ¶¶40, 41, 60(h) (App. 28a, 135a). The allegation that Chvatal directed other Board members to deny Plaintiffs' appeal is repeated in several Counts. See Amend. Compl. ¶¶92(d); 108 (App. 46a, 53a). Plaintiffs also allege Chairman Chvatal "colluded" with Town Counsel Attorneys Rappaport and Goldsmith. See Amend. Compl. ¶60(i) (App. 35a).

Allegations against most of the other Town employees are also thin. Town Administrator Mr. Whritenour purportedly failed to intervene on behalf of the Zarbas, conspired with other officials to cause harm to the Zarbas, and "encouraged, directed and participated in" alleged unconstitutional conduct by other officials. See Amend. Compl. ¶74 (App. 40a). Whritenour, too, is alleged to have "conspired" with the Town's attorneys. See Amend. Compl. ¶¶60(o), 73, 112, 124 (App. 36a, 40a, 54a, 57a). The Principal Assessor Mr. Bailey allegedly tampered with the Zarba's assessor tax documents to improperly increase their property taxes. See Amend. Compl. ¶¶52, 79, 92(f), 111 (App. 31a, 41a, 47a, 53a). The Amended Complaint also alleges Whritenour conspired with Bailey about these tax increases. See Amend. Compl. ¶¶79, 92(f), 111 (App. 41a, 47a, 53a). Current Building Inspector Thomas Perry is alleged to have somehow "ousted" the Plaintiffs from the guest house by backdating a Temporary Occupancy Permit. See Amend. Compl. ¶¶53, 60(o), 73, 112, 124 (App. 31a, 36a, 40a, 54a, 57a). As typical for Plaintiffs, Thomas Perry is thrown among the conspirators with Town Counsel. See Amend. Compl. ¶¶60(o), 73, 112, 124 (App. 36a, 40a, 54a, 57a).

The bulk of the individually targeted allegations are against former Building Inspector

Barbadoro, whom the Amended Complaint repeatedly alleges "conspired" with the Town's attorneys. See, e.g., Amend. Compl. ¶¶25, 60(b), 68, 75 (App. 25a, 33a, 39a, 40a). Former Building Inspector Barbadoro also allegedly denied the Zarba's Final Occupancy Permit because the Town's attorney advised him "that the Zarba's property may have a zoning issue." See Amend. Compl. ¶23 (App. 25a). Indeed, the Amended Complaint expressly alleges Barbadoro stated he relied on the Town Attorney's advice in withholding the occupancy permit. See Amend. Compl. ¶39 (App. 28a). Barbadoro issued the enforcement orders when finding the Plaintiff's property not in conformance with set-back requirements. See Amend. Compl. ¶¶35, 60(g) (App. 27a, 34a). Barbadoro also issued citations for parking regulation violations. See Amend. Compl. ¶60(f) (App. 34a).

II. The Proceedings Below

In their federal lawsuit, Plaintiffs filed an Amended Complaint on January 16, 2020, in response to Motions to Dismiss brought by the Defendants. See Doc. #85 (First Cir. Record App. 10); Amended Compl. (App. 19a). The Amended Complaint was met with three Motions to Dismiss: one by the Town of Oak Bluffs; one by the Town officials who were sued individually; and one by the Town Attorneys and their law firm. See Town Mot. Dismiss (First Cir. Record App. 161); Thomas Perry, et al., Mot. Dism. (First Cir. Record App. 275); Ronald Rappaport, et al., Mot. Dism. (First Cir. Record App. 293). Plaintiff filed a single opposition to the three motions to dismiss, and the Town Attorney Defendants filed a Reply Memorandum. See Pl. Opp. to Mot. Dism. (First Cir. Record App. 350); Ronald Rappaport, et al. Reply

Memo. (First Cir. Record App. 466). In a detailed 11-page Memorandum and Order dated August 11, 2020, the Trial Court, Sorokin, J., granted all of the Defendants' Motions to Dismiss. See Order on Motions to Dismiss (App. 4a). The Plaintiffs' Notice of Appeal followed. See Notice of Appeal (R.A. 775).

On Appeal, Plaintiffs expressly waived the claims brought in four of the Counts, stating the "Judgment entered for the Defendants on Counts IV, VI, VII, VIII are not at issue in Plaintiffs' appeal."[4] See Pl. First Cir. Br. p. 7. Thus, the First Circuit was called on to address five Counts: Count I alleging civil rights violations under 42 U.S.C. §1983, mentioning Due Process (Procedural and Substantive) as well as Equal Protection guarantees; Count II alleging conspiracy to violate civil rights under 42 USC §1985 by and among the various Town officials and Town Counsel; Count III appearing to be a direct action under the Fourteenth Amendment alleging violations of Equal Protection, Substantive and Procedural Due Process; Count V alleging violation of the Fifth Amendment by "Inverse Condemnation," citing delays in issuance of an occupancy permit, restrictions on parking, an inaccurate survey, installation of a street sign and other actions; and Count IX asserting claims of Negligence and Negligent Infliction of Emotional Distress.[5] See

[4] The waived Counts were all state law claims; one entitled "Aiding and Abetting Fraud" (Ct. IV); one alleging violation of the Massachusetts Civil Rights Act (Ct. VI); one a direct action under the Massachusetts Declaration of Rights (Ct. VII); and one claiming an "Invasion of Private Property" (Ct. VIII). See Amend. Compl. (R.A. 93).

[5] There is no mention of the Negligence or Negligent Infliction of Emotional Distress Claim in the Petition for

Amend. Compl. (App. 19a). The First Circuit summarily affirmed the trial court's allowance of the Motion to Dismiss. See First Cir. Judgment dtd. 8/15/2021 (App. 1a). The First Circuit stated, "After de novo review of the record and careful consideration of the parties' briefs on appeal, we affirm the district court's decision granting the defendants' motions to dismiss, for substantially the reasons stated in the district court's order entered August 11, 2020." Id. Plaintiffs' Petition for Rehearing En Banc was subsequently denied on December 30, 2021. See First Cir. Order dtd. 12/30/21.

REASONS FOR DENYING THE PETITION

I. The Petition Contains No Grounds for Certiorari Review

The narrow grounds upon which the Supreme Court grants certiorari review, set forth in its Rule 10, are (a) the Appeals Court ruling conflicts with decisions of other Circuits on the same issue; (b) the State's highest court ruling on a federal question conflicts with other state courts or Circuit Courts; or (c) the lower courts have decided an important question of federal law that should be settled by the Supreme Court (or conflicts with rulings by the

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Certiorari, thus the dismissal of these state law claims is also waived. See U.S. Sup. Ct. R. 14.1(a) ("Only the questions set forth in the petition, or fairly included therein, will be considered by the Court."); see also Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 34 (1993) ("faithful application of Rule 14.1(a) thus helps ensure that we are not tempted to engage in ill-considered decisions of questions not presented in the petition. Faithful application will also inform those who seek review here that we continue to strongly "disapprove the practice of smuggling additional questions into a case after we grant certiorari."

Supreme Court). See U.S. Sup. Ct. R. 10. This Petition presents none of these circumstances. Instead, the Plaintiffs expressly base their Petition on claims that the trial court decision allowing the Motion to Dismiss was "wrong" on the facts or the law, and that the decision was "unjust and facts of this matter are unprecedented". See Pet. for Cert. pp. 13-25. Rule 10 governing Certiorari review explicitly states "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." See U.S. Sup. Ct. R. 10 (emphasis added). It is well-settled that "the issuance of the writ is discretionary." Hammerstein v. Superior Ct. of Cal., 341 U.S. 491, 492 (1951) (stating the "presence of jurisdiction upon petition for writ of certiorari does not, of course, determine the exercise of that jurisdiction").

The Petition does not even suggest that the First Circuit summarily affirming the trial court's dismissal of the Complaint was a "decision in conflict with the decision of another United States court of appeals on the same important matter". See U.S. Sup. Ct. R. 10(a). Instead, Plaintiffs cite a concurring opinion in the Tolan case to improperly argue Certiorari review is warranted even in the absence of such a conflict among the Circuit courts. See Pet. For Cert. p. 14 (citing Tolan v. Cotton, 572 U.S. 650, 661 (2014) (Alito, J. concurring). Of course, the per curiam ruling in Tolan reversing summary judgment did not at all address the standard of review on Certiorari. See Tolan, supra at 651-660. Absent a conflict among the Circuit Courts, Rule 10(a) does not

provide an avenue for Certiorari review.[6] See U.S. Sup. Ct. R. 10(a). The Rule 10(b) basis for Certiorari is inapplicable because there is no state court decision at issue. Plaintiffs appear to be seeking Certiorari review under Rule 10(c) permitting review when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." See U.S. Sup. Ct. R. 10(c). This case does not present the rare circumstances for certiorari review under the first clause of Rule 10(c) because there is no Important question of federal law that has not been decided by [the U.S. Supreme] Court." Id. Plaintiffs merely are aggrieved by the dismissal of their lawsuit under the well-settled standard of review for Motions to Dismiss under Rule 12(b)(6). There are no important issues never before addressed by the Supreme Court, instead Plaintiffs are seeking review solely based on their personal interest in the outcome. The Supreme "Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants." Rice v. Sioux City Mem'l Park Cemetery, 349 U.S. 70, 74 (1955). Rule 10 states that "[a] petition for a writ of certiorari will be granted only for compelling reasons." See U.S. Sup. Ct. R. 10. The crux of this case is the municipal denial of an occupancy permit because of a property line dispute.

[6] Similarly, the second clause in Rule 10(c) provides a mechanism for review when a Circuit Court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." See U.S. Sup. Ct. R. 10(c). Again, nothing in the First Circuit affirming dismissal conflicts with any decision of the U.S. Supreme Court, nor does the Petition even make an argument that such a conflict with Supreme Court precedent exists.

This is not a case of sufficient importance to merit Supreme Court review.

II. The First Circuit's Affirmance of the Dismissal was Well Founded

The Plaintiffs' Amended Complaint was properly dismissed for "failure to state a claim upon which relief can be granted." See Fed. R. Civ. P. 12(b)(6). The Amended Complaint did not meet the well-established standard "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). As to the five counts upon which Plaintiffs appealed, each were deficient as a matter of law and fact. Count One asserted a claim under 42 U.S.C. §1983 of civil rights violations of "both procedural and substantive due process," as well as "equal protection and procedural due process." See Amend. Compl. ¶¶61-62 (App. 37a). The trial court properly rejected the procedural due process claim because Plaintiffs plead they received all the process that was due, including "informal meetings with town officials coupled with judicial review in the state courts satisfie[s] the Constitution's procedural due process requirements." Quinn v. Bryson, 739 F.2d 8, 11 (1st Cir. 1984). Furthermore, Plaintiffs provided no factual allegations as to how the state's post-deprivation remedial process was inadequate; thus, "no claim of a violation of procedural due process can be brought under § 1983." Lowe v. Scott, 959 F.2d 323, 340 (1st Cir. 1992). The substantive due process claim failed because "rejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process." Torromeo v. Town of Fremont, 438 F.3d 113, 118 (1st

Cir. 2006). The equal protection theory was rejected because Plaintiffs failed to allege any facts about "similarly situated" property owners, let alone any facts as to how such owners were treated differently than Plaintiffs. See Freeman v. Town of Hudson, 714 F.3d 29, 38 (1st Cir. 2013). Count III seeking to bring a direct action for these civil rights claims was properly dismissed for the same grounds. Meanwhile, the civil rights conspiracy claim in Count II was properly dismissed because the Amended Complaint failed to allege that that "the defendants conspired against them because of their membership in a class." Aulson v. Blanchard, 83 F.3d 1, 4 (1st Cir. 1996). The Takings claim in Count V was properly dismissed because no regulatory taking exists when the mere "diminution in the value of property, however serious, is insufficient to demonstrate a taking." Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal., 508 U.S. 602, 645 (1993); Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 131 (1978). In addition, Plaintiffs include no factual allegations as to their reasonable investment-backed expectations. See Penn Central, 438 U.S. at 124. The trial court properly found that the government action at issue here - consideration of permit applications not found to be malicious by a state court, and enforcement of parking regulations - is typically given great leeway by courts." See Order on Motions to Dismiss (App. 13a) (citation omitted). Moreover, the physical improvements that Plaintiffs challenge - like snow plowing, mowing, installing a public street sign, and changing the level of a grade - are transient invasions that do not give rise to a Fifth Amendment takings claim. O'Grady v. City of Montpelier, 573 F.2d 747, 750 (2d Cir. 1978) (holding that "it is fairly well

established that changing the level of a grade of a road does not constitute a taking"); Boise Cascade Corp. v. United States, 296 F.3d 1339, 1357 (Fed. Cir. 2002) (holding that "extremely limited and transient" invasions of property "preclude a finding that a taking occurred as a matter of law").

III. The Well-Settled Standard of Review under Rule 12(b)(6) and the *Monell* Doctrine for Municipal Liability Are Not Properly Before the Court

Plaintiff's Certiorari Petition improperly posits two grounds for review concerning the standard for dismissal under Rule 12(b)(6) and municipal liability under §1983 pursuant to the Monell doctrine. Contrary to the assertions in the Petition, the trial court did "accept as true" the factual allegations in the Complaint, and stated this in reciting the legal standard from review under Rule 12(b)(6) after a lengthy four paragraph summary of the complaint allegations with citation to specific paragraphs of the Amended Complaint. See Order on Motions to Dismiss (App. 5a-8a) (citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). The Petition's argument concerning the Monell doctrine are indecipherable, but the trial court properly concluded the Amended Complaint contained no allegations of an unconstitutional municipal policy as an additional basis for dismissal. See Order on Motions to Dismiss (App. 9a) (citing Monell v. Dep't of Soc. Servs., 436 U.S. 658, 665 (1978)). Regardless, as set forth above, the request to retread the well-trodden law governing the standard for dismissal under Rule 12(b)(6), and the standard for municipal liability under Monell are not within the narrow grounds for a Petition for Certiorari under Rule 10.

CONCLUSION

Petitioners have failed to satisfy the criteria for the issuance of a writ of certiorari to the United States Court of Appeals for the First Circuit. Respondents respectfully request that the petition be denied.

Respectfully submitted,

The Defendants-Appellees,
TOWN of OAK BLUFFS, THOMAS PERRY, ROBERT WHRITENOUR, KRIS CHVATAL, ANDREA ROGERS, PETER YOARS, MICHAEL PERRY, LLEWELLYN ROGERS, DAVID BAILEY, and MARK BARBADORO,

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