

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Ken Kolberg and Tara Smith,

Plaintiffs

File No. 62-CV-14-4029

ORDER

City of St. Paul, St. Paul Department of
Safety and Inspections, and Ricardo X.
Cervantes, in his capacity as Director of
DSI,

Defendants.

This matter came before the Court on June 13th, 2014 pursuant to Plaintiffs' Motion for Temporary Restraining Order. Plaintiffs were represented by Laura Jelinek, Esq. and Lisa Hollingsworth, Esq. Defendants were represented by Therese Skarda, Esq.

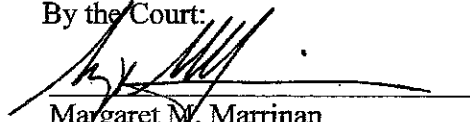
The Court having considered the arguments and submissions of counsel, now:

ORDERS

1. Plaintiffs' Motion for Temporary Restraining Order is denied.

Dated this 24th day of June, 2014

By the Court:



Margaret M. Marrinan
Judge of District Court

Memorandum

Facts

1. Plaintiff Kolberg, is the owner of a condominium at 330 East 9th Street in St. Paul; Plaintiff Smith resides with Kolberg.
2. In early 2013, after a complaint was received regarding life safety and fire separation issues in the buildings containing this condominium, the City inspected the buildings and found them non-compliant with building and housing codes.
3. Throughout 2013 and into early 2014, the City worked with the condominium association in attempts to bring the buildings into compliance with housing and building codes.
 - a. In a meeting held in early December 2013, members of the association (Kolberg included) met with Defendant, Cervantes; at that time it was agreed that the City would continue to allow occupancy of the buildings if the association had the fire sprinkler, fire alarm, and heating systems operational by December 16th, 2013. When compliance was not achieved, the City sent property owners a list of attorneys with whom they could consult regarding the situation. The association met with an attorney. Mr. Kolberg had notice of that meeting.
 - b. The City held four hearings before the Legislative Hearing Officer, and three hearings before the City Council in attempts to work with the association and Mr. Kolberg to bring the property into compliance. Kolberg personally appeared at a minimum of two of those hearings and testified at one of them.
4. After 10 inspections were conducted over the course of the year, on January 22, 2014 the City issued an order revoking the building's certificate of occupancy and ordered that if by February 28, 2014, the safety issues in the buildings were not remedied, immediate enforcement of the order would take place and the buildings vacated.
5. The revocation and order to vacate was physically posted inside the building containing the mailboxes for all the units in the buildings. It was also sent to the designated representative of the association, Jim Bartholow. It was not mailed directly to Mr. Kolberg or to any other individual member of the association.
6. Following an appeal by two of the homeowners of the association, the City Council upheld the recommendation of the Legislative Hearing Officer to vacate the buildings, but allowed an extension until May 1, 2014 in which to become code compliant. If not compliant by that date, the buildings were ordered vacated no later than June 1, 2014.
7. At the appeal, Councilmember Thune asked whether individual units could be

separated out and the vacate order enforced only against non-compliant units. The Hearing Officer said they could be, but some issues such as gas lines affected the entire building. Ultimately, Mr. Thune moved to uphold the Hearing Officer's recommendation, but asked the Hearing Office to try to find a way to vacate only those units which remained non-compliant.

8. Plaintiffs allege they were not personally notified of the hearing.
9. On May 2nd, 2014, the buildings were inspected by the City, and as a result of that inspection, Defendants revoked the Fire Certificate of Occupancy and ordered the buildings to be vacated by June 1, 2014.
10. Plaintiffs allege that the only deficiency cited relative to their unit is that one wall does not measure 5/8 inch in thickness. Otherwise they allege that there are no specific fire hazards or other health or safety hazards present with respect to their unit.
11. Plaintiffs vacated the unit per the City's order and are now alleged to be homeless.
12. Plaintiffs filed a complaint in District Court alleging violations of both procedural and substantive due process rights under 42 U.S.C. Sec 1983.
13. They now request the Court grant a temporary restraining order enjoining the City from enforcing its order to vacate their unit.

Analysis

Jurisdiction

The City contends that the Court has no subject matter jurisdiction over this matter as Plaintiffs have failed to exhaust their administrative remedies; however, since Plaintiffs allege violations of 42 U.S.C. Sec. 1983, exhaustion of state administrative remedies is not required.¹

Temporary Restraining Order

A. Nature and relationship between the parties

The City has provided every opportunity to the association and to Plaintiffs to bring their building into compliance with building and housing codes. Over the course of one year, it has conducted meetings, held hearings, granted extensions, heard appeals, and even gone so far as to refer the association to attorneys, none of which has resulted in compliance.

¹ *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 (1982).

While the Court recognizes that Plaintiffs themselves may have been cooperative throughout this relationship, *the association was not*, and this is the ultimate crux of the matter here.

B. Balance of Harms

The Court understands and fully sympathizes with Plaintiffs' current predicament. They have made a long-term investment in the condominium and have been met with the difficulties of a dysfunctional and under-funded association. While the problems that precipitated these events cannot be laid entirely at their doorstep, they are problems attendant in any communal living situation.

The revocation of the certificate of occupancy has resulted in Plaintiffs seeking other living arrangements. If Plaintiffs succeed in this matter, they may be compensated with money damages for rents paid and other expenses incurred during their ouster.

Granting their request for a restraining order, however, would result in the City losing its ability to enforce the critical life-safety codes at issue here.

For this reason, the Court finds that the balance of harms tips in Defendants' favor.

C. Likelihood of Success

Plaintiffs' substantive due process claims are twofold: 1) that Defendant, DSI, refused to follow the directives of the City Council in excising from the vacate order any unit found code-compliant; and 2) that Plaintiffs are exempt from maintaining a certificate of occupancy on their condominium.

It is Plaintiffs' contention that the City Council issued a "directive" to DSI to excise compliant units from the vacate order. It is also their position that the Council adopted this as an amendment to the Hearing Officer's prior order to vacate.

A review of the minutes, however, indicates that the amendment was not to excise compliant units from the vacate order, but merely to allow more time for the association to become compliant. And the so-called "directive" was actually a *request* that the Hearing Officer try to find a way to vacate and isolate the units whose owners were non-compliant. This request was met with the response by the Hearing Officer that "they could be, *but some issues such as gas lines in the basement affected the entire building.*"

Because there was no "directive" and because utilities cannot flow merely to one or two units in a condo association, Plaintiffs' challenge here is weak.

Similarly weak is the contention that Plaintiffs are exempted from the requirement of obtaining a certificate of occupancy. While Minn. Stat. Sec. 40.03 does exempt owner-occupied houses and *condominiums* from the requirements of obtaining certificates of

occupancy, it does not exempt *buildings* housing condominium units from such a requirement.

Plaintiffs' procedural due process claims are likewise weak. First, not only did the City mail to the association's representative a copy of the revocation and order to vacate, it also physically posted it inside the building next to the association's mailboxes in late January, 2014. Second, Mr. Kolberg had access to counsel and attended meetings at which these issues were discussed. There is no record of him objecting to either lack of notice or the use of the association as his representative in this matter.

For the above reasons, the Court finds Plaintiffs' likelihood of success questionable.

D. Public Policy Considerations

The Court finds that the enforcement of critical life-safety codes outweighs Plaintiffs' property interests in this matter.

E. Administrative Burdens

Granting Plaintiffs' request for a temporary restraining order in this matter would burden not only the City, but also the Court. Allowing Plaintiffs to re-occupy their unit in an unsafe building would be dangerous and require an immense amount of oversight on both the City's and the Court's part. And based upon the record of non-compliance, it could potentially be years before the building reached compliance.

Therefore, based upon the above, the Court denies Plaintiffs' motion for temporary restraining order.

6-24-14

MMM

A handwritten signature in black ink, consisting of several vertical, wavy lines followed by a diagonal stroke.