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2019 IL App (3d) 170843-U

Order filed January 16, 2019
Modified Upon Denial of Rehearing February 21, 2019

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2019

WAYNE HUMMER TRUST COMPANY AS)	Appeal from the Circuit Court
TRUSTEE OF TRUST NO. HBT-1939)	of the 12th Judicial Circuit,
DATED JUNE 21, 2004, and HARTZ)	Will County, Illinois.
CONSTRUCTION COMPANY, an Illinois)	
Corporation,)	
)	
Plaintiffs-Appellants,)	Appeal No. 3-17-0843
)	Circuit No. 14-L-269
v.)	
)	
VILLAGE OF ELWOOD, an Illinois Home)	
Rule Municipal Corporation,)	Honorable
)	Raymond E. Rossi,
Defendant-Appellee,)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Trial court properly granted summary judgment in favor of village based on statute of limitations; continuing violation doctrine did not save developers' claims because approval of ordinance that repealed residential zoning was a single overt act.

¶ 2 Plaintiffs Wayne Hummer Trust as Trustee of Trust No. HBT-1939 dated June 21, 2004 (Wayne Hummer Trust) and Hartz Construction Company (Hartz Construction) appeal from an order of the circuit court granting summary judgment to the Village of Elwood (Elwood) based on the statute of limitations and section 2-103 of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/2-103 (West 2016)). On appeal, plaintiffs claim that the continuing violation doctrine tolled the statute of limitations. In the alternative, plaintiffs maintain that Elwood is not immune from liability because its conduct was willful and wanton. We hold that the continuing violation doctrine does not toll the running of the limits period and affirm.

¶ 3 **BACKGROUND**

¶ 4 In September of 2004, NLSB Bank and developer Lincoln-Way Partners entered into a development agreement with the Village of Elwood. On January 5, 2005, Wayne Hummer Trust purchased a portion of the property governed by the agreement with the intent to develop the area and build a residential complex, referred to as Evergreen Chase.

¶ 5 Shortly after the purchase, Hartz Construction, the beneficiary of the trust, began working with Elwood to rezone the parcel for development, along with another parcel for a second development named Elwood Lakes. On December 13, 2006, Elwood passed Ordinance No. 846, Ordinance No. 847, and Ordinance No. 848 (residential ordinances) (Village of Elwood Ordinances Nos. 846, 847, & 848 (eff. Dec. 13, 2006)) rezoning the Elwood Lakes property from Agricultural to Residential R2A and Commercial C-4.

¶ 6 After several months of negotiations, Hartz Construction failed to execute a development agreement for Elwood Lakes. In September 2007, Elwood's attorney wrote to Hartz Construction stating that it would no longer continue to negotiate the terms of the agreement and

that if the developer did not execute a development agreement, the residential ordinances approved in December of 2006 would be repealed. On October 2, 2007, Hartz Construction's attorney responded in a letter, which stated:

“After much consideration, Hartz Construction Company has decided to move in another direction with Elwood Lakes property. We will not be attending the next Board Meeting and are not opposing the Village Board repealing the prior authorization.”

¶ 7 On November 21, 2007, Elwood passed and approved Ordinance No. 879 (repealing ordinance) (Village of Elwood Ordinance No. 879 (eff. Nov. 28, 2007)), which repealed the residential ordinances. In the minutes approving the ordinance, the board cited Hartz Construction's failure to execute the development agreement. Based on the board's decision to repeal the residential ordinances, Hartz Construction was unable to construct a multi-family development on the property.

¶ 8 On September 25, 2008, Wayne Hummer Trust and Hartz Construction filed a petition in the circuit court seeking to disconnect the property from Elwood under section 7-3-6 of the Illinois Municipal Code (Municipal Code) (65 ILCS 5/7-3-6 (West 2008)). In their petition, plaintiffs stated that the 338-acre parcel was zoned agricultural and was currently devoted to agricultural use. Plaintiffs further alleged that there were no existing or approved plans to develop the property.

¶ 9 In April 2014, plaintiffs filed suit, claiming that (1) the Evergreen Chase development agreement had been breached, (2) Ordinance No. 879 was legally ineffective because the village failed to provide public notice or a public hearing, and (3) Hartz Construction had suffered damages due to the repealing ordinance's continued enforcement against the Elwood Lakes

development. In total, the complaint contained nine counts. Only counts III, V, VII, and VIII are at issue on appeal. Specifically, count III alleged a violation of section 1983 of the federal Civil Rights Act (42 U.S.C. § 1983 (2012)), claiming that plaintiffs were denied due process and equal protection under the federal and state constitutions. Count V claimed that Elwood violated plaintiffs' due process rights. Count VII alleged violations of sections 11-13-2 and 11-13-14 of the Municipal Code (65 ILCS 5/11-13-2, 11-13-14 (West 2014)), which require municipalities to give public notice and hold a public hearing before adopting an ordinance. Count VIII alleged that Elwood's "illegal" act of adopting Ordinance No. 879 violated Ordinance No. 162.024, a rule that requires the village to file an application and hold a public hearing when adopting or amending an ordinance. The remaining counts included allegations of breach of statutory duty and spoliation of evidence based on claims that the village clerk unlawfully destroyed the original residential ordinances.

¶ 10 In his deposition, Donald Hartz, the president of Hartz Construction, testified that he had received notice that Elwood was going to repeal the residential ordinances prior to the village board's November 21, 2007, meeting:

“Q: Okay. So November 21st of 2002 [sic] the village board is going to have a meeting to undo what they've done for the benefit of Elwood Lakes?

A: Okay. And they gave me notice to that and I said, 'What good does it do me to go down there? They're not going to do what I said that we agree to.' It's like everything else we went through there.”

¶ 11 Elwood filed a motion for summary judgment on counts III, V, VII, and VIII, asserting that the counts were barred by the statute of limitations, and a motion to dismiss counts VII and VIII, claiming that section 2-103 of the Tort Immunity Act (745 ILCS 10/2-103 (West 2016))

granted the village absolute immunity. Following a hearing, the trial court granted summary judgment in favor of Elwood on counts III, V, VII and VIII based on the statute of limitations and granted summary judgment on counts VII and VIII under section 2-103 of the Act. This interlocutory appeal followed.

¶ 12

ANALYSIS

¶ 13

Plaintiffs claim that the trial court erred in granting summary judgment in favor of Elwood as to counts III, V, VII, and VIII based on the statute of limitations. They argue that the continuing violation doctrine saves their due process and statutory claims because the harmful effects of the invalid repealing ordinance lingered into the limitations period.

¶ 14

The viability of plaintiffs' claims is dictated by the statute of limitations. Count III is a federal claim pursuant to section 1983 and is subject to a two-year statute of limitations. *Limestone Development Corp. v. Village of Lemont, Illinois*, 520 F.3d 797, 805 (7th Cir. 2008). Counts V, VII, and VIII are state law claims that seek damages for wrongful conduct. Accordingly, they are subject to the one-year statute of limitations under the Tort Immunity Act. 745 ILCS10/8-101 (West 2016).

¶ 15

In this case, plaintiffs filed a petition to detach a portion of the property on September 25, 2008, in which they acknowledged that the property was not zoned for commercial development. Thus, at the latest, they knew by September 25, 2008, that their property had reverted to an agricultural zoning designation. They did not file their complaint against Elwood until April 4, 2014, more than five years later. Therefore, counts III, V, VII, and VIII are barred by the statute of limitations.

¶ 16

Plaintiffs acknowledge that their claims may be time barred but contend that they are able to avoid summary judgment based on the "continuing violation" doctrine. The continuing

violation doctrine allows a suit to be delayed until a series of wrongful acts evolves into a claim upon which a lawsuit may be brought. *Limestone*, 520 F.3d at 801. Thus, in reality, it is a doctrine about a cumulative violation, not a continuing violation. *Id.* The doctrine does not apply to cases where the harm is definite and discoverable and nothing prevented the party from coming forward to seek redress. *Wilson v. Giesen*, 956 F.2d 738, 743 (7th Cir. 1992). Where there is a single overt act from which subsequent damages may flow, the statute begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, despite the continuing nature of the injury. *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 279 (2003).

¶ 17 In *Limestone*, the plaintiff claimed that the Village of Lemont deliberately and without justification treated Limestone worse than other landowners with respect to road maintenance and access. In response to the statute of limitations defense, the plaintiff argued that the continuing violation doctrine applied because the harmful effects lingered into the limitations period by depressing the eventual sale price of the property. *Limestone*, 520 F. 3d at 805. The court rejected that argument:

“[T]his is another misuse of the ‘continuing violation’ doctrine. The discrimination injured Limestone in 1993 and the statute of limitations began to run then. If subsequent discriminatory acts caused additional injury, the limitations period for suing on those acts accrued when the additional injury was discovered. *** As we said earlier, difficulty in quantifying damages may sometimes be a basis for equitable tolling, but it does not postpone the start of the limitations period. Not the extent, but the fact, of injury starts the period running.” *Id.*

¶ 18 Similarly, courts have recognized that where an ordinance is passed, which is claimed to have a negative effect on the value of a person's property, the continuing violation doctrine does

not apply. See *Kuknle Brothers, Inc. v. County of Geauga*, 103 F. 3d 516, 521 (6th Cir. 1997) (continuing violation doctrine does not apply to section 1983 claim based on a county resolution that resulted in a taking under eminent domain); *Superior-FCR Landfill, Inc. v. County of Wright*, 59 F. Supp. 2d 929, 936 (D. Minn. 1999) (ill-effects of ordinance that continued to injure plaintiff after its enactment did not establish continuing violation). A continuing violation is marked by continued unlawful acts and conduct, not by continual ill-effects from an initial violation. See *Bank of Ravenswood v. City of Chicago*, 307 Ill. App. 3d 161, 167-68 (1999) (city's construction of tunnel under plaintiff's property created a continual effect based on presence of subway below ground but not a continual violation). As such, the continuing violation doctrine is generally not applicable to civil rights claims, due process allegations, or adverse impact claims based on the application of a municipal ordinance. See *Hoagland v. Town of Clear Lake, Indiana*, 415 F.3d 693, 700 (7th Cir. 2005) (continuing violation doctrine not applicable to civil rights claim based on ordinance to prohibit land strips); *Hyon Waste Management Services, Inc. v. City of Chicago*, 214 Ill. App. 3d 757, 765 (1991) (due process claim was barred by statute of limitations where city's sealing of hazardous waste incinerator was not subject to continuing violation doctrine).

¶ 19 This case is similar to *National Advertising Co. v. Raleigh*, 947 F.2d 1158 (4th Cir. 1991). There, the city passed an ordinance restricting outdoor advertising signs and provided a 5-and-a-half-year grace period for nonconforming signs that already existed. *Raleigh*, 947 F.2d at 1161. The plaintiff claimed that there were continuing violations subsequent to the passage of the ordinance when the city sent it a letter informing the company that its signs would have to be removed. The court found that the restriction on use and the economic loss occurred upon enactment of the ordinance and that the city had taken no action since that added to the

company's alleged injury. Specifically, the court held that "the fact that National's signs ultimately were required to be removed or brought into conformity by April 1989 was one of the *effects* of their being deemed nonconforming upon enactment of the ordinance, not a separate violation." (Emphasis in original.) *Id.* at 1167.

¶ 20 Here, count III is a section 1983 due process claim based on the assertion that plaintiffs were deprived of their property when Elwood passed the repealing ordinance, which changed the zoning on plaintiff's property from residential to agricultural. The constitutional nature of that claim is the violation of a property right. Similarly, counts V, VII, and VIII seek damages based on allegations that the adoption of the repealing ordinance decreased the value of plaintiffs' property. However, Elwood's act of passing Ordinance No. 879 was a single act, and any damage occurred upon enactment of that ordinance and the reinstatement of the agricultural zoning. No subsequent action taken by the village added to plaintiffs' alleged damage. Any harm that may have resulted after Elwood passed the repealing ordinance was due to the effects of the ordinance and does not provide a basis for applying the continuing violation doctrine. Accordingly, the trial court's order granting summary judgment in favor of Elwood on counts III, V, VII, and VIII is affirmed.

¶ 21 CONCLUSION

¶ 22 The judgment of the circuit court of Will County is affirmed.

¶ 23 Affirmed.