



Shubert Org. v. Landmarks Preservation Comm'n 570 N.Y.S. 2d 504 (N.Y. App. Div. 1991)

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case that the availability of a tort remedy under the FTCA was sufficient to satisfy the plaintiffs due process rights.¹⁶ Although the relief obtainable under the FTCA was damages and not the injunctive relief sought by plaintiff, this relief was not so deficient as to constitute a denial of the plaintiff's due process rights. An alternative remedy can provide less relief.¹⁷ The Supreme Court has made clear that it is the comprehensiveness of the total statutory scheme and not the completeness of specific remedies that determines whether the plaintiff has a separate remedy such as *Bivens*.¹⁸ In dismissing the plaintiff's due process claim for injunctive relief, the court found that Congress offered a comprehensive recovery scheme through the FTCA, and the plaintiff chose not to use that remedy.

The plaintiff's claim under the takings clause was likewise dismissed for failure to state a claim. In order to proceed with a claim under the takings clause the plaintiff must prove that the government took his property under lawful authority.¹⁹ In the instant case, the plaintiff repeatedly asserted that the Smithsonian held the paintings unlawfully and without lawful authority. The court found that the plaintiff's claims sounded in tort and therefore were not within the scope of a fifth amendment taking.

Conclusion

The plaintiff in this case was denied any relief under his claims of bailment, replevin, due process, and a fifth amendment taking. Under the bailment claim, he failed to show the mutual assent of both Ms. Brooks and the Smithsonian to consider the exchange a bailment. The replevin claim was barred because it sounded in tort and the plaintiff failed to sue under the FTCA within the two year statute of limitations. Moreover, his failure to utilize the FTCA within the limitation period deprived him of stating a cause of action under due process. The takings claim was denied because it sounded in tort rather than a fifth amendment constitutional violation. Ω

Karen R. Brown

1. French: Sales: Acquisition by Contract, 1990 MARTINDALE-HUBBELL LAW DIGEST: CANADIAN AND INTERNATIONAL LAW DIGEST, UNIFORM ACTS, A.B.A. CODES at FRA-25:

Every creation or transfer of real property interest by contract must be by notarial act registered upon Register of Real Estate Mortgages. This includes deeds of sale, deeds of gift, contracts, rights of usufruct or servitudes, long term leases, attachment liens, contracts creating or dissolving tenancy in common and condominium. (Law of Mar. 23, 1885, Supp. by Decree of Oct.

30, 1935 and Decree of Jan. 4, 1955). Failure to register enables acquisition of property by bona fide purchaser or loss of priority to subsequent transferee who first registered.
 2. 28 U.S.C. § 1346(b) (1991).
 3. See note 1, *supra*.
 4. See *MacAvoy v. The Smithsonian Institution*, 757 F. Supp. 60 (D.D.C. 1991).
 5. *Id.* at 65.
 6. *Id.*
 7. *Id.* at 67.
 8. *Id.*
 9. 29 U.S.C.A. § 41 (West 1991).
 10. 28 U.S.C. § 1346(b) (1991).
 11. See, e.g., *MacAvoy*, 757 F. Supp. at 68.
 12. *Id.*
 13. 28 U.S.C. § 2401(b) (1991).
 14. *MacAvoy*, 757 F. Supp. at 69; see generally *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).
 15. 757 F. Supp. at 69.
 16. *Id.*
 17. *Id.*
 18. *Id.* at 70; accord *Schweiker v. Chilichy*, 487 U.S. 412 (1988).
 19. See *MacAvoy*, 757 F. Supp. at 70.

Shubert Org. v. Landmarks Preservation Comm'n, 570 N.Y.S.2d 504 (N.Y. App. Div. 1991).

Introduction

Petitioners, Broadway theatre owners, brought suit against the Landmarks Preservation Commission of the City of New York (the "Commission") challenging the designation of their buildings as historical landmarks. The petitioners argued that the landmark preservation statute should be declared null and void because it violated Article 78 of New York's Civil Practice Law and Rules and that application of the statute constituted a taking of their property in violation of the fifth amendment.¹

The court held that the landmark designation was based upon a thorough investigation and was not arbitrary or capricious.² The court also denied the constitutional challenge, holding that the application of the Landmarks Law is not a taking of property.³ The Supreme Court of New York, Appellate Division, affirmed the lower court's decision which granted the Commission's motion for summary judgment.⁴

Facts

The Commission designated the petitioners' buildings as historical landmarks following several public hearings which the petitioners attended. During the designation process, the Commission reviewed material provided by several sources discussing the historical, cultural, and aesthetic aspects of each

theatre. As a result of the landmark designations, no changes could be made to the exterior of the buildings without the prior approval of the Commission.⁵ The petitioners brought suit against the Commission claiming that the designation of their buildings as landmarks interfered with their ability to adapt the theatres to changing production needs. The Supreme Court, New York County, granted the Commission's motion for summary judgment.⁶ The petitioners appealed to the Supreme Court of New York, Appellate Division.

Legal Analysis

The petitioners argued that the Commission's designation of their buildings as historical landmarks was an attempt to preserve the Broadway theatre industry as a whole, rather than individual structures. In support of this argument, the petitioners emphasized that each of the buildings was unique and that there was no common architectural design running between the buildings.

In response to the petitioners' argument, the court addressed the issue of whether the judiciary can review the decisions made by an administrative body. Generally, the court may not substitute its judgment for that of an administrative body where a hearing was held and there was substantial evidence to support the finding.⁷ The court noted that the Commission's decision was based upon an exhaustive investigation consisting of reports and testimony of experts.

The court recognized that manipulation of the Landmarks Preservation Law to preserve the Broadway theatre industry rather than individual theatres would have been improper.⁸ The court considered the evidence that each hearing addressed the exterior and/or interior of the buildings in compliance with the Landmarks Preservation Law. The court held that the designation decisions were not arbitrary or capricious.⁹

The court then addressed the issue of whether the Landmarks Law, as applied to the petitioners, amounted to a "taking" of their property within the meaning of the fifth amendment. Under the Landmarks Preservation Law, the owner of a designated building must keep the exterior in good repair and secure approval of the Commission before exterior alterations are made.¹⁰ The petitioners argued that the designation denied them the opportunity to adapt their buildings to changing productions. This resulted in an additional cost factor incurred by both theatre owners and producers.

In response to this argument, the court relied upon *Penn Central Transportation Co. v. City of New York*

which established that the application of the Landmarks Law does not amount to a taking of property within the meaning of the fifth amendment.¹¹ The petitioners attempted to distinguish *Penn Central Transportation Co. v. City of New York* by emphasizing that the case dealt with the issue of restrictions on alterations of historical landmarks rather than the method of landmark designation. The court, however, rejected this distinction noting that the restriction on alterations arises out of landmark designation. The court next considered whether the Landmarks Law denied the petitioners' "essential use" of their property. A land use regulation is determined to deprive the owner of

"essential use" of their property when it "renders the property unsuitable for any reasonable income[,] productive or other private use for which it is adapted and thus destroys its economic value, or all but a bare residue of its value."¹² The court noted that there was no prohibition which prevented the petitioners from receiving an economic benefit from the use of their theatres for productions. The court concluded that the petitioners failed to demonstrate that the law, as applied to them, denied them "essential use" of their property.¹³

Additionally, the court noted that the petitioners' claim that they were deprived of "economic use" of their property was not ripe for review.¹⁴ This was because the Commission had not replied to the petitioners' applications for renovations or alterations of their buildings.

Conclusion

The court upheld the historical designation of the Broadway theatres, noting that it was based upon exhaustive research and complied with the Landmarks Law. The constitutional challenge was denied. However, the court mentioned that the issue of whether the petitioners were deprived of "economic use" of their property was not ripe for review because the Commission had not responded to the petitioners' applications for renovations. If the Commission denies the petitioners' applications for renovations or alterations, the petitioners must emphasize their inability to remain competitive in the theatre industry and that, as a result, they have been deprived of the "economic use" of their property. Ω

Karen Barancik

1. *Shubert Org. v. Landmarks Preservation Comm'n.*, 570 N.Y.S.2d 504, 505 (N.Y. App. Div. 1991).

2. *Id.* at 507.

3. *Id.* at 508.

4. *Id.* at 504.