

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

Complaint of Joseph B. Hurwitz and Steven
G. Kimbell, COMPLAINANTS

Docket No. C99-3

MOTION OF UNITED STATES POSTAL SERVICE
TO DISMISS COMPLAINT
(May 10, 1999)

INTRODUCTION AND BACKGROUND

On April 9, 1999, the Postal Rate Commission received a document captioned "Joseph B. Hurwitz, et al., Class-Action Complaint of Wrongful Change of Postal Address and Motion to Rescind the 'ZIP Code Boundary Review Process' Survey Guidelines" filed by Joseph B. Hurwitz and Steven G. Kimbell. By letter dated that same day, the Office of the Secretary, Postal Rate Commission, designated the docket number above and advised the General Counsel, United States Postal Service, of the complaint's filing under title 39, United States Code § 3662.

Complainants, who describe themselves as "residents of and owners of home-based businesses in the Montgomery Village development area (the Area) of Montgomery County, Maryland," (Complaint at 1), allege that they, and other similarly situated individuals in the Area, as a result of ZIP Code changes made pursuant to the Postal Service's ZIP Code Boundary Review Process, unlawfully have been deprived of "the right to utilize business materials in which they have invested which bear last lines of address including ZIP code as indicia, bearing their former 'postal identity,' Gaithersburg, MD 20879," forcing them to "change said materials to reflect a new 'postal identity,' Montgomery Village, MD 20886." Complaint at 8. *Inter alia*,

Complainants allege violations of 39 U.S.C. 3661 (b) and (c), (Complaint at 2), 5 U.S.C. 605, 603, 604, and 610 (*id.* at 2-3), the Tenth Amendment of the United States Constitution (*id.* at 6), 39 U.S.C. 403(c) (*id.* at 6), "the due process clause of the Fifth Amendment to the United States Constitution," (*id.* at 8), the "unjust enrichment doctrine," (*id.* at 9), the "just compensation clause of the Fifth Amendment," (*id.* at 11), and the First Amendment (*id.* at 14). Complainants also allege that criminal violations have occurred, referring to alleged "actionable fraud" (*id.* at 14), mail fraud under 18 U.S.C. 1341 (*id.* at 15), as well as Racketeer Influenced and Corrupt Organization Act (RICO) violations under 18 U.S.C. 1961 and 1962 (*id.* at 15-17). Complainants estimate that costs to home-based businesses in the Area resulting from "postal identity" changes "exceed one million dollars," and nationally are "on the order of tens of millions of dollars." *Id.* at 15-16.

Complainants previously sought redress in the courts. These efforts seeking relief on grounds of tort, various Constitutional violations, common law fraud, and civil conspiracy were summarily dismissed, based in part on a finding that the Postal Service changes to plaintiff's addresses were made within the scope of its statutory authority.¹ Having failed to secure a remedy in court, Complainants now turn to the Commission for an "administrative remedy." Complainants now seek the following relief under 39 U.S.C. § 3662:

1. That the address changes and ZIP Code boundary changes about which they complain be reversed and restored to their prior configurations;
2. That letters be sent (presumably by the Postal Service) to postal customers notifying them of the reversal ; and
3. That "the Survey Guidelines be rescinded."

¹ See Memorandum opinion granting defendant's motion to dismiss, CIV No. JFM-98-2293 (D. Md., January 20, 1999); Memorandum opinion denying motion to alter or amend judgment, CIV No. JFM-98-2293 (D. Md., February 5, 1999). Both opinions are attached for the convenience of the Commission as Exhibits 1 and 2.

Complaint at 17-18.

The Postal Service hereby moves that the complaint filed in this docket be dismissed,² for several reasons. First, Complainants have failed to allege that the Postal Service is charging rates which do not conform to the policies set out in Title 39 or that Complainants are not receiving postal service in accordance with the policies of that Title, as required by § 3662. Second, Complainant's allegations concern operational matters placed by the Congress within the exclusive discretion of the Postal Service, over which the Commission lacks jurisdiction. Finally, even if this matter were properly before the Commission under § 3662, which it is not, the Commission is not authorized by that section to grant the relief requested by Complainants.

ARGUMENT

The Commission has recently summarized the standards that it applies to complaints filed under § 3662:

By its terms, the complaint procedure provided in § 3662 is available to two categories of persons: (1) interested parties who believe the Postal Service is charging rates not in conformity with the policies set out in Title 39; and (2) interested parties who believe that they are not receiving postal service in conformity with the policies in Title 39. The second category is restrictive, in that an interested party's complaint must be directed to a service or services it is receiving (or allegedly should be receiving), rather than some generalized complaint about postal service.

* * * *

Once a qualifying complaint has been lodged, § 3662 commits to the

² Because the Postal Service is hereby moving to dismiss the Complaint, the Postal Service, by separate pleading filed today, seeks to toll the time by which it must file an answer to the Complaint. See Motion of United States Postal Service For Extension of Time in Which to File an Answer (May 10, 1999). Although the Postal Service is not filing an answer today to Complainant's allegations, the attached court orders include findings which provide insights into the merits of the Complaint.

Commission's discretion a choice whether to hold hearings on the complaint, or not. Generally, the Commission has exercised this discretion on a case-by-case basis. However, early in its institutional history the Commission adopted a rule to guide the discretionary exercise, which states:

The Commission shall entertain only those complaints which clearly raise an issue concerning whether or not rates or services contravene the policies of the [Postal Reorganization] Act; thus, complaints raising a question as to whether the Postal Service has properly applied its existing rates and fees or mail classification schedule to a particular mail user or with regard to an individual, localized or temporary service issue not on a substantially nationwide basis shall generally not be considered as properly raising a matter of policy to be considered by the Commission.

39 C.F.R. § 3001.82. While the Commission has not used this regulation to bar absolutely any consideration of individual or localized rate and service complaints -- especially where the Postal Service allegedly acted in an arbitrary, discriminatory, capricious or unreasonable manner -- it has served as a basis for declining to conduct hearings on controversies that did not raise questions of general postal policy.

Order No. 1239 (May 3, 1999) at 9-10.

Application of these standards to the instant Complaint directly supports dismissal. The Complaint clearly fails to allege that the Postal Service is charging rates not in conformity with the policies set out in Title 39, as required by the first clause of § 3662. Complainants also make no showing that their receipt of postal service fails to conform with the policies in Title 39. It is apparent the Mr. Hurvitz and Mr. Kimbell continue to receive mail delivery service to their homes just as they did before the ZIP Code adjustment about which they complain.

The Complaint does not even involve "an individual, localized, or temporary service issue not on a substantially nationwide basis" (39 C.F.R. §3001.82); it does not involve any service issues at all. The issue for Complainants is not that they fail to receive delivery service as before, it is that the mail delivered to them now must bear a

different ZIP Code and post office designation than in a prior time period. The Complaint therefore questions operational details surrounding the Postal Service's ongoing administration of the nation's mail delivery system, in particular mail delivery in certain section of the State of Maryland. It is beyond dispute that in formulating the Postal Reorganization Act, the Congress did not intend to convey to any entity other than the Postal Service the authority to manage the details of ZIP Code administration or other matters necessary to establish, maintain or refine the mail delivery system. The Complaint thus does not fall within the scope of 39 U.S.C. § 3662 or any other grant of jurisdiction to the Postal Rate Commission.³

Moreover, even if the Complaint were construed, for purposes of argument, to properly fall within the bounds of § 3662, it fails to state a claim for which the Commission could grant relief and requests relief which the Commission lacks authority to order. As the Commission has recently reiterated, only two forms of relief can result from proceedings under § 3662. If the complaint involves a matter covered by subchapter II, § 3662 directs the Commission to conduct formal hearings in conformity with § 3624, as it does in rate and classification dockets. If the matter is not covered by subchapter II, the Commission is to hold a hearing, and if the complaint is found to be justified, render a public report to the Postal Service, which shall take such action as it deems appropriate. See Order No. 1239 at 11. These are the only remedies available pursuant to § 3662. The Commission simply does not possess the authority to order

³ Although Complainant argues that the Postal Service's ZIP Code policies also violate §3661, this allegation similarly founders upon that fact that no service change has occurred. Under § 3661, Complainants must show that "a change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis" has occurred. Complainant's have not made such a showing, nor can they, since the Postal Service has maintained delivery service in Maryland and nationwide in substantially the same manner before and after the events cited by Complainants, all the while administering the ZIP Codes essential to such delivery service.

that address changes and ZIP Code boundary changes be reversed and restored to their prior configurations, that letters be sent to postal customers notifying them of the reversal, or that Postal Service regulations, policies or survey guidelines be rescinded.⁴

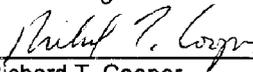
Because the Complaint fails to raise rate, classification or service issues to be considered by the Commission within the meaning of 39 U.S.C. § 3662, as implemented by 39 C.F.R. § 3001.82, and because the Complaint requests relief which the Commission lacks authority to provide, the Complaint should be dismissed.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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May 10, 1999

⁴ The Commission is undoubtedly aware that ZIP Code administration is an ongoing administrative function, with boundary decisions being made on almost a daily basis. If such decisions were to be subjected to Commission review, one could expect a large number of such complaints, with a substantial effect on ongoing postal operations.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FILED
ENTERED
JAN 20 1999
U.S. DISTRICT COURT, JMD
DEPUTY

JOSEPH B. HURWITZ, et al.,

Plaintiffs,

v.

THE MONTGOMERY VILLAGE
FOUNDATION, et al.,

Defendants.

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Civil Action No. JFM-98-2293

MEMORANDUM

Plaintiffs Joseph B. Hurwitz and Steven G. Kimbell have filed this pro se class action against defendants Montgomery Village Foundation, Todd Peter Kristian, Kettler Brothers, Inc., and the United States Postal Service. Plaintiffs complain that defendants were involved in an illegal effort to change the last line of plaintiffs' postal address from Gaithersburg, MD 20879 to Montgomery Village, MD 20886. All defendants have filed motions to dismiss. For the reasons stated below, the motions will be granted.

I.

Plaintiffs Joseph B. Hurwitz and Steven G. Kimbell are residents of, and owners of home-based businesses in, an area of Maryland recently affected by a postal address change. Defendant Montgomery Village Foundation is plaintiffs' homeowners association and defendant Todd Peter Kristian is the executive vice-president of the Foundation. Defendant Kettler Brothers, Inc. is a Maryland corporation that develops homes in Montgomery Village.

Plaintiffs allege that Kertler Brothers, the Foundation, and Mr. Kristian conspired with each other and with the United States Postal Service to change the postal address of plaintiffs' neighborhood from Gaithersburg, MD 20879 to Montgomery Village, MD 20886. Plaintiffs allege class wide damages based on the expenses that home-based businesses incurred as a result of the address change, including the replacement of stationary, business cards, brochures, and checks.

II.

Plaintiffs' complaint fails to comply with Fed. R. Civ. P. 10(b), which requires a party to set out separate claims in separately numbered paragraphs. Pro se pleadings, however, are entitled to liberal construction and should not be dismissed unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." See Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir. 1978). A liberal reading of plaintiffs' complaint reveals allegations against the United States Postal Service sounding in tort as well as constitutional claims based on the Fifth, Tenth, Fourteenth, and Twenty-Sixth Amendments to the United States Constitution. Plaintiffs assert common law fraud and civil conspiracy claims against the non-governmental defendants.

Plaintiffs have filed three amendments to their initial complaint. Because no defendants have filed responsive pleadings to date, plaintiffs' first amendment, which attempted to clarify plaintiffs' fraud and conspiracy allegations, is allowed as of right. Fed. R. Civ. P. 15(a). Successive pleadings, however, require leave of court or consent of the adverse party. Id. Plaintiffs' second amendment purports to supplement their class action allegations and the third amendment attempts to add the United States as a defendant. Considering the deference owed to pro se litigants, plaintiffs' second and third filings will be treated as Rule 15(a) motions to amend. Because plaintiffs have failed to state a claim, however, the motions will be denied and the second and third amendments will not be permitted.

A.

Plaintiffs assert a Fifth Amendment takings claim. To the extent that plaintiffs have alleged that the postal address change has had some incidental affect on property value in the neighborhood, it is only regulatory actions that compel a physical invasion of an owner's real property or deny "all economically beneficial or productive use of land" that are compensable takings under the Fifth Amendment. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992) (emphasis added). Plaintiffs have not alleged that the change to their postal address has rendered their land economically idle. To the extent that plaintiffs' pre-printed business material became worthless due to the change of address, the Fifth Amendment proscription against uncompensated takings simply does not encompass the inconvenience of having to replace such items. Compensation is only required where "the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggests that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." Yee v. City of Escondido, 503 U.S. 519, 522-23 (1992). Such a situation is not present here.

Plaintiffs' remaining constitutional claims may be disposed of summarily. The Tenth Amendment reserves to the States those powers not delegated to the federal government. Congress was clearly within its power to establish the Postal Service to effectuate interstate and international mail service. The Fourteenth Amendment is inapplicable to the federal government, and the Twenty-Sixth Amendment provides the right to vote in state and federal elections to citizens eighteen years of age and older. Plaintiffs allege that the Postal Service

improperly conducted a survey to gauge community sentiment about the address change, but these allegations do not concern a state or federal election.

Plaintiffs' tort claims against the Postal Service must be dismissed for failing to comply with the procedural requirements of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-80. The FTCA requires a plaintiff to exhaust his administrative remedies before filing suit in district court when the action is for monetary damages and is based on a "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 2675(a); see also Global Mail Ltd. v. United States Postal Serv., 142 F.3d 208, 214-15 (4th Cir. 1998) (holding that Postal Reorganization Act's general waiver of sovereign immunity restricted in that claimants suing Postal Service for claims cognizable under the FTCA must follow FTCA procedures). The ZIP code system is designed to facilitate the efficient processing of mail and the Postal Service is responsible for assigning ZIP codes. 39 U.S.C. § 401(2) (granting power to Postal Service to "adopt, amend, and repeal such rules and regulations as it deems necessary to accomplish" the efficient processing and delivery of mail). Because the Postal Service was acting within the scope of its statutory authority when it changed plaintiffs' postal address, the procedural requirements of the FTCA, including the requirement that claimants exhaust administrative remedies, applies to plaintiffs' claim. Because Plaintiffs have not exhausted their administrative remedies, this court lacks subject matter jurisdiction to entertain their tort claims.

B.

A liberal reading of plaintiffs' complaint reveals claims for fraud and civil conspiracy against the non-governmental defendants. To state a claim for fraud, a plaintiff must allege that:

(1) the defendant made a false representation to the plaintiff; (2) the falsity of which was either known to the defendant or that the representation was made with reckless indifference as to its truth; (3) the misrepresentation was made for the purpose of defrauding the plaintiff; (4) the plaintiff relied on the misrepresentation and had the right to rely on it; and (5) the plaintiff suffered damages. See Alleco, Inc. v. Harry & Jeanette Weinberg Found., Inc., 665 A.2d 1038, 1047-48 (Md. 1995). In addition, fraud must be pled with particularity. Fed. R. Civ. P. 9(b).

In response to defendants initially raising the lack of particularity with respect to the fraud allegations, plaintiffs filed a thirty-five page amendment to their complaint in which they attempted to supplement the fraud and conspiracy charges. As amended, plaintiffs still fail to state a claim for fraud. Plaintiffs have alleged a long campaign in which the non-governmental defendants lobbied the Postal Service for a ZIP code change, but have not alleged that any of the defendants made false representations to the plaintiffs or that plaintiffs relied on any such representations.

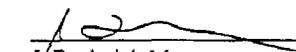
Plaintiffs' conspiracy allegations must be dismissed because no action for conspiracy may lie "unless the acts actually done, if done by one person, would constitute a tort." Robb v. Wancowicz, 705 A.2d 125, 132 (Md. Ct. Spec. App.) (quoting Domchick v. Greenbelt Consumer Serv., 87 A.2d 831, 834 (Md. 1952)), cert. denied, 711 A.2d 869 (Md. 1998). Because plaintiffs have alleged no tort, their conspiracy allegations fail as well.

III.

Defendants Kettler Brothers, Montgomery Village Foundation, and Todd Peter Kristian have requested Rule 11 sanctions against plaintiffs. They have not, however, complied with the procedural requirements contained in Rule 11, including moving separately for sanctions and

serving plaintiffs with the sanctions motion twenty-one days before filing it with the Court. Fed. R. Civ. P. 11(c)(1)(A). In any event, it is in the interest of all parties and the Court to bring this case to an end without ancillary litigation about sanctions. A separate order effecting the rulings made in this Memorandum is being entered herewith.

July 20, 1999
Date


J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FILED
FEB 5 1999
BY _____ DEPUTY CLERK
DISTRICT OF MARYLAND

JOSEPH B. HURWITZ, et al.,

Plaintiffs,

v.

THE MONTGOMERY VILLAGE
FOUNDATION, et al.,

Defendants.

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Civil Action No. JFM-98-2293

MEMORANDUM

By memorandum opinion on January 20, 1999, I granted defendants' motions to dismiss. Plaintiffs have filed a "Motion for a New Trial." Plaintiffs' motion, under the liberal construction afforded pro se parties, will be considered a Rule 59(e) motion to alter or amend a judgment.

"[T]here are three grounds for amending an earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." Pacific Ins. Co. v. American Nat'l Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998). In their pending motion for reconsideration, plaintiffs have merely reiterated the arguments they made in opposition to the defendants' original motions to dismiss. I thoroughly considered those arguments prior to dismissing the action and found them unpersuasive. A separate order denying plaintiffs' motion is being entered herewith.

July 4, 1999
Date

J. Frederick Motz
United States District Judge

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JFM

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with section 12 of the Rules of Practice, I have this day served the foregoing document upon:

Joseph B. Hurwitz
10204 Kindly Court
Montgomery Village, MD 20886

and

Steven G. Kimbell
19359 Keymar Way
Montgomery Village, MD 20886


Richard T. Cooper

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May 10, 1999