COLORADO COURT OF APPEALS

DATE FILED: July 16, 2015
CASE NUMBER: 2014CA1472

Court of Appeals No. 14CA1472
Boulder County District Court No. 13CV30314
Honorable Andrew Hartman, Judge

Butterball, LLC, a North Carolina limited liability company,

Plaintiff-Appellant,

v.

City of Longmont, a political subdivision of the State of Colorado,

Defendant-Appellee.

JUDGMENT AFFIRMED AND CASE
REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE NIETO*
Gabriel and Navarro, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced July 16, 2015

Alderman Bernstein, LLC, Jody Harper Alderman, Carrie S. Bernstein, Amy E Arlander, Jessica Kosares, Denver, Colorado, for Plaintiff-Appellant

Hall & Evans, L.L.C., Thomas J. Lyons, Lance E. Shurtleff, Matthew J. Hegarty, Denver, Colorado, for Defendant-Appellee

*Sitting by assignment of the Chief Justice under provision of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2014.

Butterball, LLC, appeals the district court's grant of summary judgment in favor of the City of Longmont (city) on Butterball's claims that the city violated Butterball's federal and state procedural due process rights by enacting a new zoning ordinance. We affirm.

I. Background

Butterball owned several properties in the city, which were used for industrial purposes. In December 2011, Butterball ceased operations in the city, employing only a caretaker there. It soon began looking for a buyer. Although the city expressed interest in acquiring the properties, no agreement was reached.

In June 2012, the city began the process of enacting a new zoning ordinance, which ultimately rezoned about a hundred acres of the city, about a quarter of which consisted of the Butterball properties. Public meetings about the rezoning were held in August, October, and December of the same year. According to the city, in advance of each meeting, notices were sent to Butterball by regular United States mail at the North Carolina address listed with the Boulder County Assessor, and to all other owners of property in or within 750 feet of the rezoning area. According to Butterball, it

did not receive these notices. Although Butterball did not participate in the public meetings, other property owners who were notified by mail did participate.

In January 2013, the city enacted the new zoning ordinance, which prohibited industrial uses on the Butterball properties which had previously been permitted. Upon learning about the ordinance, Butterball sued the city, asserting that the city had violated its due process rights by "failing or refusing to provide proper and legal notice" when it enacted the ordinance, as well as other claims which were dismissed by stipulation.

As a result of the lawsuit, in the fall of 2013, the city took steps to "reenact" the ordinance, holding five public meetings in connection with the reenactment. In advance of each of these meetings, notices were sent to Butterball by certified mail at the same North Carolina address used before. Butterball received each of the notices. In addition, the city posted signs on the properties in the rezone area, in accordance with provisions of the city's municipal code. Butterball participated in the new round of proceedings; nonetheless, the ordinance was "reenacted" in October 2013.

In January 2014, the city moved for summary judgment, in support of which it submitted an affidavit of the transportation manager, stating that he had conducted each of the mailings before the public meetings on the ordinance the first time it was enacted. Although the affidavit does not state that the transportation manager personally placed the notices in the mail, it does state that city staff conducted the mailings under his supervision. It further states that none of the notices sent to Butterball was returned as unclaimed or undeliverable, and that notice was also published in a local newspaper before two of the meetings. In addition, the affidavit briefly describes steps the city subsequently took to reenact the ordinance.

The court found that it was undisputed that the city mailed the notices to Butterball, and it concluded that Butterball was not deprived of due process under either the United States or Colorado Constitution. It further concluded that Butterball's alleged damages were not compensable, since the city achieved the same outcome through the reenactment process, in which Butterball participated, as it did when it enacted the ordinance the first time.

II. Issues on Appeal

Butterball argues that the district court erred by granting summary judgment in favor of the city because (1) whether the city mailed the notices was a disputed issue of material fact, precluding summary judgment; (2) the city violated Butterball's federal procedural due process rights; (3) the city violated Butterball's state procedural due process rights; and (4) the city's reenactment of the ordinance did not render Butterball's damages not compensable. The city argues that it is entitled to appellate costs associated with this appeal.

III. Summary Judgment

We review de novo the district court's grant of summary judgment. *Yellow Jacket Water Conservancy Dist. v. Livingston*, 2013 CO 73, ¶ 6. Summary judgment is appropriate only if the pleadings, affidavits, depositions, or admissions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *McDonald v. Zions First Nat'l Bank*, 2015 COA 29, ¶ 45.

The burden initially is on the moving party to establish that there is no genuine issue of material fact. *Id.* at ¶ 46. "Once the moving party has met its initial burden, the burden shifts to the

nonmoving party to establish that there is a triable issue of fact." *AviComm, Inc. v. Colo. Pub. Utils. Comm'n*, 955 P.2d 1023, 1029 (Colo. 1998). "If the nonmoving party does not submit evidence, or point the court to particular evidence already of record, to make out a triable issue of material fact, then the moving party is entitled to summary judgment as a matter of law." *Luttgen v. Fischer*, 107 P.3d 1152, 1154 (Colo. App. 2005). We review all the evidence properly before the district court in the light most favorable to the nonmoving party, and all doubts as to whether a triable issue of fact exists must be resolved against the moving party. *Id.* at 1155.

The city argues that we should not consider evidence presented to the trial court in Butterball's motion for reconsideration. However, it is not clear from the trial court's order denying their motion that it did or did not consider this material. Therefore, we will consider all of the record that was presented to us.

A. Genuine Issue of Material Fact

Butterball argues that the court erred by concluding that it was undisputed that the city mailed the notices to Butterball, and

therefore there was a genuine issue of material fact precluding summary judgment. We disagree.

We first conclude that the city met its initial burden of showing that no genuine issue of material fact existed as to whether the notices had been sent. The transportation manager's affidavit states that the mailings were conducted under his supervision and describes how the list of addresses (including Butterball's) was obtained, how the mailing labels were generated, and how members of the city's staff were directed to use them. This evidence was sufficient to shift to Butterball the burden of proving that a triable issue of fact existed as to whether the city mailed the notices in the manner described.

We further conclude that Butterball failed to satisfy its burden of proving the existence of a genuine issue. Butterball faults the affidavit because it does not state who actually placed the notices in the mail, yet it presented no evidence directly contradicting any statement in the affidavit. *See Mehaffy, Rider, Windholz & Wilson v. Cent. Bank Denver, N.A.*, 892 P.2d 230, 244 (Colo. 1995) ("Genuine issues of material fact . . . are not raised simply by means of

counsel's argument, but must be raised by specific factual allegations showing a factual controversy.").

Butterball argues that the transportation manager's deposition testimony "diminishes the certainty of the affidavit statements." However, the differences Butterball highlights between the affidavit and deposition are insubstantial. For example, in his deposition, the transportation manager said that when he stated in the affidavit that he "conducted" the mailings, he meant that he "oversaw" them. Although the deposition provides additional details about how the notices were created and stuffed into envelopes, how the labels were generated, and how the entire set of 203 envelopes, including 7 addressed to Butterball, was rubber banded together and "handed to our person to mail them," none of these additional details contradicts any statement in the affidavit. Thus, even viewing this evidence in the light most favorable to Butterball, it does not raise a genuine issue as to whether or not the notices were in fact mailed.

Nor does the mere allegation, even if true, that Butterball did not receive the notices establish the existence of a genuine issue. As discussed below, notice by regular mail was sufficient to satisfy both federal and state constitutional requirements.

B. Federal Procedural Due Process

Butterball argues that the district court erred by concluding that its federal procedural due process rights were not violated. We are not persuaded.

In *Mathews v. Eldredge*, 424 U.S. 319, 335 (1976), the Supreme Court articulated a three-factor balancing test for assessing a due process claim:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Such claims may also be analyzed by applying the test set forth in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), which requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *See Dusenbery v. United States*, 534 U.S. 161, 167 (2002)

(considering the *Mathews* test but applying the "more straightforward test" from *Mullane*).

Regardless of the test applied, "[d]ue process does *not* require that a property owner receive actual notice before the government may take his property." *Jones v. Flowers*, 547 U.S. 220, 226 (2006) (emphasis added). "[U]nder most circumstances, notice sent by ordinary mail is deemed reasonably calculated to inform interested parties that their property rights are in jeopardy." *Weigner v. City of New York*, 852 F.2d 646, 650 (2d Cir. 1988); *see also Snider Int'l Corp. v. Town of Forest Heights*, 739 F.3d 140, 147 (4th Cir. 2014) ("So long as the agency did not have reason to believe that the citation recipient could not be reached at that address, the mailed notice would be sufficient."). Further, "where mailing is supplemented by other forms of notice, such as posting or publication, the risk of non-receipt is constitutionally acceptable." *Weigner*, 852 F.2d at 651.

Here, the city had no reason to believe that Butterball could not be reached at the North Carolina address where it mailed the initial notices. None of the mailings was returned as unclaimed or undeliverable, and Butterball concedes that it later received (at the

same address) notices sent by certified mail regarding the reenactment proceedings. Butterball cannot establish a federal procedural due process violation merely by asserting that it did not receive the notices. *See Snider Int'l Corp.*, 739 F.3d at 146 ("Actual notice is not necessary."); *see also Weigner*, 852 F.2d at 649 ("The proper inquiry is whether the state acted reasonably in selecting means likely to inform persons affected, not whether each property owner actually received notice.").

In addition to the mailed notice, notice of two meetings was published in the local newspaper. Under these circumstances, the city employed means that were reasonably calculated to provide Butterball with actual notice, and the requirements of due process were met.

Based on our conclusion that the city discharged its burden by acting reasonably in selecting means likely to inform Butterball about the zoning ordinance, we find unavailing Butterball's other contentions that additional or substitute procedural safeguards were required under *Mathews*. The city's chosen method of mailing personalized notices (along with publication) was so efficacious that the minimal risk of erroneous deprivation was constitutionally

acceptable. *See Weigner*, 852 F.2d at 651. The city had no reason to doubt the effectiveness of the procedures used, and any additional procedures would impose additional fiscal and administrative burdens on the city. Thus, under the cost-benefit analysis required under *Mathews*, the efficacy of the procedures used negated the need for additional safeguards. *See Mathews*, 424 U.S. at 348 ("At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost."). Under these circumstances, the city's procedures were reasonably calculated to apprise Butterball of the proceedings. *See Dusenbery*, 534 U.S. at 168.

We disagree with Butterball's contention that its lack of participation in the first round of proceedings meant that the city should have known that its attempts at notice had failed, and therefore it should have employed additional safeguards to ensure Butterball received notice. Cases cited by Butterball for this proposition are inapposite because here the city had no reason to believe that the mailings would not reach Butterball, nor did it receive any direct indication that they had not in fact reached

Butterball. *Cf. Jones*, 547 U.S. at 225 (holding that when mailed notice of a tax sale is returned unclaimed, the government must take additional reasonable steps to attempt to provide notice if it is practicable to do so).

We also disagree with Butterball's contention that the city was required to employ additional means because while the zoning ordinance was being promulgated, city officials were communicating with Butterball's representatives about possibly acquiring the properties. Butterball cites no authority, nor are we aware of any, for the proposition that an entity with an "established relationship" with a government entity is entitled to additional process. Nor does the fact that the city employed the additional procedural safeguards of sending certified mail and posting notices on the affected properties prior to the reenactment proceedings establish that the means employed initially were not "such as one desirous of actually informing the absentee might reasonably adopt" to provide notice of the initial proceedings. *Mullane*, 339 U.S. at 315.

We also reject Butterball's contention that even if the mailings were received, their content was inadequate to provide notice of the nature of the rezoning. Butterball's reliance on *Moreland Properties,*

LLC v. City of Thornton, 559 F. Supp. 2d 1133 (D. Colo. 2008), is misplaced. The *Moreland Properties* court found that the posted and published notices failed to provide "any indication that the ordinance might eliminate permitted uses" under the current zoning classification, in part because the new ordinance would create a new "overlay district." *Id.* at 1159. In contrast, here the city sent individualized notices to the affected property owners informing them how their properties could be rezoned under existing classifications. *Cf. id.* at 1160. Moreover, this is not a case where the simultaneous publication of notices "created a serious potential for confusion of interested persons." *Hallmark Builders & Realty v. City of Gunnison*, 650 P.2d 556, 559-60 (Colo. 1982). Notice of a public hearing in connection with a zoning ordinance, "at a minimum, must give the date, time, and place of the hearing and apprise the public of the subject matter of the hearing and the nature of the proposed zoning change." Butterball does not argue that these basic requirements were not satisfied.

Therefore, we discern no violation of Butterball's federal procedural due process rights.

C. State Procedural Due Process

Butterball argues that the court erred by finding that state procedural due process requirements were satisfied even though the city failed to comply with municipal code provisions which require physically posting notice on properties affected by rezoning. We disagree.

In its complaint, Butterball sought review of the city's enactment of the zoning ordinance under C.R.C.P. 106(a)(4), in part "because notice requirements of the Code were not strictly complied with." However, Butterball voluntarily dismissed that claim.

The alleged failure by the city to comply with provisions of its municipal code, without more, does not amount to a state procedural due process claim. "[T]he question raised in a procedural due process challenge [to the application of state statutes and regulations] is whether the level of process afforded to [a plaintiff] passed constitutional muster, not whether [a government agency] followed statutes or regulations." *Ward v. Anderson*, 494 F.3d 929, 935 (10th Cir. 2007); *see also Feldewerth v. Joint Sch. Dist. 28-J*, 3 P.3d 467, 471 (Colo. App. 1999). While there must be strict compliance with the duty to give adequate notice, "in the absence of explicit statutory language requiring it, a

statute requiring the providing of notice by a specified means need not be strictly applied." *Feldewerth*, 3 P.3d at 471. Having already rejected Butterball's arguments based on its federal procedural due process rights, we further conclude that Butterball's contention that its state procedural due process rights were violated, premised solely on its assertion that the city did not comply with certain municipal code provisions, also fails.

D. Damages

Butterball argues that the district court erred by finding that any damages it suffered were not compensable because they resulted from the rezoning itself, not from any procedural defects. Having determined that Butterball's procedural due process rights were not violated, we need not reach this alternative ground supporting summary judgment.

IV. Appellate Costs and Attorney Fees

The city is entitled to its appellate costs pursuant to C.A.R. 39(a). Butterball's Expedited Motion to Add Request for Attorney Fees on Appeal is denied as moot.

V. Conclusion

The judgment is affirmed, and the case is remanded with directions to determine the amount of its appellate costs.

JUDGE GABRIEL and JUDGE NAVARRO concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

CHRIS RYAN
CLERK OF THE COURT

PAULINE BROCK
CHIEF DEPUTY CLERK

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(l), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b) will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: October 23, 2014

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