IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
February 5, 2020
Lyle W. Cayce
Clerk

No. 17-60302

ESTATE OF CHARLES W. HOLT,

Plaintiff - Appellant

v.

CITY OF HATTIESBURG; MAYOR JOHNNY DUPREE; SOUTHERN PINES ANIMAL SHELTER,

Defendants - Appellees

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 2:16-CV-38

Before OWEN, Chief Judge, and WIENER and DENNIS, Circuit Judges.

PER CURIAM:*

Charles Holt's dog Max, a German Shepherd, ran away from home while emergency responders brought Holt to the hospital after he had fallen and was unable to get up. Holt, an elderly man at the time of this incident, was hospitalized for several weeks and underwent surgery. After the City of Hattiesburg (the "City") captured Max, it did not notify Holt before Max

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

became the legal property of the City automatically by operation of a Hattiesburg animal control ordinance. Holt sued the City and others under 42 U.S.C. § 1983, claiming Max was seized and forfeited without due process. The district court granted summary judgment for the defendants, concluding that Holt was provided adequate postdeprivation process through the local courts. Because the City failed to support its motion for summary judgment with evidence demonstrating that Holt was not entitled to notice and a hearing before Max's forfeiture to the City, we VACATE the district court's entry of summary judgment and REMAND for further proceedings.

I

On February 18, 2015, emergency responders arrived at the home of Charles Holt. Holt, then over 90 years old, had reportedly fallen and was unable to get up. According to Holt, his dog Max escaped from home because animal control officers allowed him to run away during the emergency. The City contends that Max escaped by jumping through a broken window in Holt's home after animal control officers tried to corral him so that the responders could take Holt to the hospital.

Max was captured by the City several weeks later. Max was subsequently impounded at the Southern Pines Animal Shelter (the "Shelter") in Hattiesburg, where he is currently kept. While Max was on the loose, and during his initial days at the Shelter, Holt was in the hospital and recovering from surgery. Holt was not notified of Max's impoundment until several weeks later. Instead, the Shelter director contacted Holt's veterinarian as well as "an acquaintance" of Holt. Some weeks later, when Holt was out of the hospital, he tried to reclaim Max, but the Shelter refused based on orders from the City.

On July 14, 2015, the Hattiesburg Municipal Court held a hearing and ordered that the Shelter retain custody of Max because Max allegedly posed a danger to Holt's caregivers and Holt did not have the physical ability to control

Max. Holt appealed to the Forrest County Court, which concluded that the City properly impounded and took ownership of Max pursuant to City Ordinance 2090 (the "Ordinance").[1] Under the Ordinance, "all animals shall be kept under restraint." Restraint under the Ordinance includes, as relevant here, keeping an animal "within the confines of its owner's home." Additionally, the Ordinance requires that "[o]wners shall exercise care and control of their animals to prevent them from becoming public nuisances." Any animal not kept under restraint or one that is a public nuisance "may be impounded." If an owner does not redeem his or her impounded animal within three days of its capture, the animal "become[s] the property of the City and shall be placed for adoption . . . or humanely euthanized."

In March 2016, Holt filed this lawsuit under 42 U.S.C. § 1983 against the City, its mayor and the Shelter (the "Defendants"), claiming that the City's actions deprived him of property without due process; he also asserted equal protection and Fourth Amendment claims and sought a declaratory judgment that the Ordinance is unconstitutional on its face.[2] The district court granted summary judgment for the Defendants and denied Holt's request for declaratory relief. Holt appealed.

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[1] Holt appealed the Forrest County Court's decision to the Forrest County Circuit Court, where the matter is still pending. In the district court, the parties debated whether abstention was proper given the pendency of state court proceedings, but the district court concluded that abstention was not appropriate. We agree that abstention is inappropriate, as Holt's action is not "purely declaratory" and the *Colorado River* factors are not met. *See African Methodist Episcopal Church v. Lucien*, 756 F.3d 788, 797 n.29 (5th Cir. 2014); *Stewart v. W. Heritage Ins. Co.*, 438 F.3d 488, 491–93 (5th Cir. 2006) (quoting *Colorado River*, 424 U.S. at 813 (describing abstention as "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it")).

[2] The Shelter counterclaimed for reimbursement of costs for caring for Max, and Holt purported to crossclaim against the City and Mayor for those costs. Having dismissed Holt's § 1983 claims, the district court declined to exercise supplemental jurisdiction over the counterclaim and crossclaim pursuant to 28 U.S.C. § 1367(c). Because we reverse the district court's dismissal of Holt's § 1983 claims, we vacate its declination of supplemental jurisdiction resting on that dismissal.

II

We review the district court's grant of summary judgment de novo, applying the same standard as the district court. *Roberts v. City of Shreveport*, 397 F.3d 287, 291 (5th Cir. 2005). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A genuine issue of material fact exists if the record, taken as a whole, could lead a rational trier of fact to find for the non-moving party. *Geoscan, Inc. of Tex. v. Geotrace Techs., Inc.*, 226 F.3d 387, 390 (5th Cir. 2000). "We view the facts and the inferences to be drawn therefrom in the light most favorable to the non-moving party." *Id.*

III

Holt died while this appeal was pending, requiring us to first determine whether his claims survive his death. We look to the law of the forum state to determine whether a § 1983 action survives the plaintiff's death. *Caine v. Hardy*, 943 F.2d 1406, 1410 (5th Cir. 1991) (en banc) (citing *Robertson v. Wegmann*, 436 U.S. 584 (1978)). Under Mississippi's survival action statute, only a "personal action" survives the death of the party bringing it and "the executor or administrator of [the] deceased party may prosecute or defend such action." MISS. CODE § 91-7-237; *see also Caine*, 943 F.2d at 1410. Mississippi courts define a "personal action" as "'an action brought for the recovery of personal property, for the enforcement of a contract or to recover damages for its breach, or for the recovery of damages for the commission of an injury to the person or property.'" *Caine*, 943 F.2d at 1410 (quoting *Powell v. Buchanan*, 147 So. 2d 110, 111 (Miss. 1962)); *see also* MISSISSIPPI LAW OF TORTS § 14:20 (2d ed. 2008) (same).

Under this framework, we retain authority over all of Holt's claims that constitute personal actions. Holt's lawsuit claims that the City unlawfully

impounded and forfeited his ownership in his dog. Therefore, to the extent the relief he seeks is "for the recovery of damages for the commission of an injury to the person or property," it survives. *Powell*, 147 So. 2d at 111. Likewise, Holt's request for injunctive relief survives his death, as it seeks "the recovery of personal property," his dog Max. *Id.* However, Holt's request that the Ordinance be declared unconstitutional on its face does not survive his death, because such a claim is not a personal action as it does not seek damages or the return of property.[3] *See Powell*, 147 So. 2d at 111.

IV

We next examine whether the district court erred in granting Defendants' motion for summary judgment, dismissing Holt's action with prejudice. The district court determined that the hearings in Municipal and County Courts in which Holt participated after Max's forfeiture to the City provided Holt with adequate postdeprivation process, such that his procedural due process claim failed as a matter of law. "We examine procedural due process questions in two steps: the first asks whether there exists a liberty or property interest which has been interfered with by the State . . .; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Ky. Dept. of Corr. v. Thompson*, 490 U.S. 454, 460 (1989) (citations omitted). We analyze these two steps in turn.

A

In determining whether Holt is entitled to process with respect to Max's impoundment and forfeiture, we must first determine whether Max is protected "property" under the Fourteenth Amendment. *See Fuentes v. Shevin*, 407 U.S. 67, 84 (1972). "'[P]roperty' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, 'property'

[3] Accordingly, we pretermit discussion of Holt's facial constitutional challenge.

denotes a broad range of interests that are secured by 'existing rules or understandings.'" *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). "Property interests protected by the procedural due process clause include, at the very least, ownership of real estate, chattels, and money." *Stotter v. Univ. of Texas at San Antonio*, 508 F.3d 812, 822 (5th Cir. 2007) (citing *Roth*, 408 U.S. at 572; *Mahone v. Addicks Util. Dist.*, 836 F.2d 921, 929 (5th Cir. 1988)).

Dogs are considered property under Mississippi law. *See Jones v. Illinois Cent. R. Co.*, 23 So. 358 (Miss. 1898) ("We incline to the opinion that a dog is 'property.'"); *Alverson v. Harrison Cty.*, No. 1:13-CV-467-LG-JCG, 2015 WL 13081329, at *2 (S.D. Miss. Apr. 15, 2015) ("The State of Mississippi has long recognized dogs as personal property."). Beginning in *Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698, 701 (1897), the United States Supreme Court has recognized that the interest of ownership in dogs is qualified in nature. The Court reaffirmed *Sentell* some years later in *Nicchia v. New York*, noting that "[p]roperty in dogs is of an imperfect or qualified nature," and so dogs "may be subjected to peculiar and drastic police regulations . . . without depriving their owners of any federal right." 254 U.S. 228, 230 (1920). Although the views expressed by the Supreme Court in these cases may be outdated, the underlying principle that an owner's property interest in his or her dog is qualified in nature remains sound. *See, e.g.*, *Altman v. City of High Point*, 330 F.3d 194, 205–06 (4th Cir. 2003); *Clark v. City of Draper*, 168 F.3d 1185, 1188 (10th Cir. 1999); *Pfeil v. Rogers*, 757 F.2d 850, 866 (7th Cir. 1985).

Dog owners are thus entitled to due process protection of their property interest in their dogs so long as they protect that interest by complying with reasonable regulations relating to the care and keeping of dogs. The Ordinance here requires that owners restrain their animals by, among other methods, keeping them in the house. It also requires that owners prevent their animals

from becoming a public nuisance. Fact disputes exist as to whether Holt complied with these provisions, because it is unclear from the record whether Holt's failure to restrain Max led to his escape from the house, or whether Max escaped for some other reason, including through someone else's fault. Construing this evidence in the light most favorable to Holt as the non-movant with respect to the motion for summary judgment, a reasonable jury could conclude that he complied with the Ordinance by adequately restraining Max and therefore maintained a valid property interest in Max and was entitled to due process. *See Stotter*, 508 F.3d at 822 (reversing grant of summary judgment on procedural due process claim alleging confiscation of personal belongings where "a reasonable juror could conclude that [the plaintiff] had a property interest in the . . . items").

B

Generally, "[t]he right to prior notice and a hearing is central to the Constitution's command of due process," as it "ensure[s] abstract fair play to the individual" and "minimize[s] substantively unfair or mistaken deprivations." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) (quoting *Fuentes*, 407 U.S. at 80–81). But due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976) (internal quotations and citations omitted). Rather, due process is "flexible and calls for such procedural protections as the particular situation demands." *Id.* (internal quotations and citations omitted).

To determine what due process requires, we balance three factors:

> 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.

Mathews, 424 U.S. at 335 (1976) (citations omitted).

Holt indisputably received no notice or a hearing before Max was taken and his ownership transferred to the City. However, the City argued below, and the district court concluded, that Holt received adequate postdeprivation process under the *Parratt*/*Hudson* doctrine through Holt's participation in state and local court proceedings. Specifically, the district court observed that Holt had hearings before the Municipal and County Courts after the City took ownership of Max. We have held that the Supreme Court's line of cases allowing a postdeprivation hearing to stand in for predeprivation notice and process (referred to as the *Parratt*/*Hudson* doctrine)[4] applies where three preconditions are met: "the deprivation must truly have been unpredictable or unforeseeable; the pre-deprivation procedures must have been impotent to counter the state actors' particular conduct; and the conduct must have been 'unauthorized' in the sense that it was not within the officials' express or implied authority." *Caine*, 943 F.2d at 1413. Absent these three preconditions, predeprivation process must ordinarily be provided under *Mathews*. *See id.* at 1411–12 ("Ordinarily, government may effect a deprivation only after it has accorded due process.").

The City in its motion for summary judgment did not show any of the three preconditions set forth in *Caine* for allowing a postdeprivation hearing to stand in for predeprivation notice and process. Moreover, the district court pretermitted without any analysis the question of whether the City was justified in providing only postdeprivation process under *Caine* and

[4] *See Hudson v. Palmer*, 468 U.S. 517 (1984); *Parratt v. Taylor*, 451 U.S. 527 (1981).

conclusorily held that such postdeprivation process was sufficient in this case. Accordingly, the district court erred in holding that Holt received all the process he was due under the *Parratt*/*Hudson* doctrine. *See Caine*, 943 F.2d at 1411–12.

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For these reasons, the judgment of the district court is VACATED and the action REMANDED for further proceedings.