

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SBA TOWERS, INC.,

Plaintiff,

v.

TOWN OF LISBON,

Defendant.

OPINION AND
ORDER

00-C-0284-C

This is a civil action for injunctive relief. Plaintiff SBA Towers, Inc. seeks a writ of mandamus ordering defendant Town of Lisbon to approve plaintiff's application for a building permit to construct and operate a communications facility on the Brian and Stacy Burdick property in the Town of Lisbon. Plaintiff alleges that defendant's denial of its building permit application violates the Telecommunications Act of 1996 and 42 U.S.C. § 1983. The court has jurisdiction under the federal question statute, 28 U.S.C. § 1331; Section 704 of the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7); and 42 U.S.C. § 1983. The case is before the court on defendant's motion to dismiss for failure to state a claim on which relief may be granted and failure to join necessary parties.

Defendant's motion to dismiss for failure to state a claim will be denied. Plaintiff's complaint sets forth a "short and plain statement of the claim showing that the pleader is entitled to relief" and thus satisfies the standard of notice pleading set forth in Fed. R. Civ. P. 8(a)(2). Plaintiff's allegation that the town board denied its application for a building permit is sufficient at this stage to establish that it was adversely affected by the board's decision; therefore, it is a proper party to this lawsuit under 47 U.S.C. § 332(c)(7)(B)(v). Because defendant has failed to articulate any basis for its claim that the Burdicks are indispensable parties other than its unfounded claim that SBA has failed to allege facts showing that it was adversely affected by the town board's denial of the building permit, the motion to dismiss for failure to join necessary parties will also be denied.

From the allegations in plaintiff's complaint, I find the following facts for the sole purpose of deciding this motion.

ALLEGATIONS OF FACT

Plaintiff SBA Towers, Inc. is a corporation organized under the laws of Florida with its principal place of business in Boca Raton, Florida. Plaintiff is licensed to do business in Wisconsin. Defendant Town of Lisbon is a Wisconsin municipal corporation located in Juneau County. Plaintiff is in the business of building wireless telecommunications towers and related

facilities for the purpose of providing personal wireless services to the public. In order to provide wireless services without coverage “gaps,” the communications facilities must be strategically located so the distance from one facility to the next is not too large. When a caller enters a gap, telephone calls and other forms of electronic communication initiated outside the gap area will be disconnected. In addition, a caller cannot receive or initiate any new calls while in a gap.

Plaintiff determined there was a coverage gap in Lisbon and found a suitable location for a communications facility to provide coverage to the gap area. Plaintiff identified the Brian and Stacy Burdick property as the suitable location and obtained an option to lease the land for a communications facility. Plaintiff then submitted an application to defendant's town board for a building permit to construct and operate a communications facility on the Burdick property.

Following a public hearing on April 13, 2000, defendant's town board voted three to zero to deny plaintiff's application for a building permit. The board issued no written decision denying plaintiff's application. Plaintiff alleges that defendant's failure to issue a written decision violates 47 U.S.C. § 332(c)(7)(B)(iii) and deprived plaintiff of its federally guaranteed rights.

OPINION

A. Motion to Dismiss for Failure to State a Claim

Under the common standard for a motion to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6), a claim will not be dismissed unless “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984). The standard is based on the system of notice pleading under which the federal courts operate. At the heart of this system is Rule 8(a)(2), which requires that every complaint contain only “a short and plain statement of the claim showing that the pleader is entitled to relief”; it does not require a plaintiff to plead facts supporting each element of a cause of action. See Sanjuan v. American Bd. of Psychiatry and Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994).

The rule 12(b)(6) motion is based on defendant's assertion that plaintiff has failed to allege facts to support a claim that defendant violated various sections of 47 U.S.C. § 332. Plaintiff's complaint, however, does not contain allegations of a variety of violations. Plaintiff alleges only that defendant violated 47 U.S.C. § 332(c)(7)(B)(iii) because defendant's denial of plaintiff's application was neither in writing nor supported by substantial evidence.

Defendant contends that plaintiff's complaint fails to state a claim because it lacks

allegations showing that plaintiff presented evidence to the town board in support of its permit application, including information regarding coverage gaps and the absence of suitable alternative sites for the tower. Defendant misunderstands the nature of a 12(b)(6) motion. The system of notice pleading under which federal courts operate means that a pleading must set forth a *claim* for relief, see Hrubec v. National Railroad Passenger Corp., 981 F.2d 962, 963 (7th Cir. 1992), not facts of proof: “At this stage the plaintiff receives the benefit of imagination, so long as the hypotheses are consistent with the complaint.” Sanjuan at 251. Plaintiff has put defendant on notice by setting forth sufficient facts that establish a claim for relief. Plaintiff has alleged that it submitted an application for a building permit necessary to construct a communications facility in the town, that the town denied the application, that the town’s decision was neither in writing nor supported by substantial evidence, and that the actions of the town violate the Telecommunications Act and § 1983. This is sufficient to put defendant on notice of plaintiff’s claim.

Because plaintiff’s complaint sets forth a claim for relief and notifies defendant of the nature of the claim, defendant’s motion to dismiss for failure to state a claim will be denied.

B. Motion to Dismiss for Failure to Join Necessary Parties

Defendant asserts that the owners of the property subject to the building application,

Brian and Stacy Burdick, are necessary parties and that plaintiff's failure to join them warrants dismissal of the complaint. (Apparently, the application for the building permit was submitted in the Burdicks' names.) Dismissal for failure to join necessary parties under Fed. R. Civ. P. 19(b) occurs only when the court determines that the party who should be joined but cannot be joined is "indispensable." Fed. R. Civ. P. 19(a) sets forth the criteria for deciding when a party should be joined in a lawsuit, but defendant does not key in on the statute. Instead, it offers only its belief that plaintiff has not included enough information in its complaint to show that *it* is a proper party to this lawsuit. This argument makes no sense. In any case, plaintiff is a proper party under the terms of 47 U.S.C. § 332(c)(7)(B)(v), which provides in part:

Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction.

Plaintiff was adversely affected by defendant's denial of plaintiff's application for a building permit to construct and operate a communications facility on the Burdick property; it alleges that defendant's denial was inconsistent with the requirements of 47 U.S.C. § 332(c)(7)(B); and it commenced this action within 30 days of defendant's denial. Therefore, it is a proper party to this lawsuit. Because defendant has offered no other reason why the Burdicks are indispensable parties, its motion to dismiss for failure to join necessary parties will be denied.

ORDER

IT IS ORDERED that defendant Town of Lisbon's motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) and for failure to join a necessary party pursuant to Fed. R. Civ. P. 12(b)(7) is DENIED.

Entered this 12th day of September, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge