

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

BARRY DONOHOO,

Plaintiff,

v.

DOUG HANSON *et al.*,

Defendants.

ORDER

14-cv-309-wmc

On September 3, 2015, this court issued a decision and order granting summary judgment to defendants on *pro se* plaintiff Barry Donohoo's claim that his constitutional rights had been violated by local officials in Douglas County, who denied his request for a land use permit. (Dkt. #85.) In its decision, the court explained that Donohoo failed to offer proof that any decision or action by defendants violated his rights under (1) the Fifth Amendment Takings Clause; (2) the Fourteenth Amendment Equal Protection Clause; or (3) the Fourteenth Amendment Due Process Clause. Now before the court is plaintiff's motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). (Dkt. #93.)

A motion to alter or amend a judgment is proper only when "the movant presents newly discovered evidence that was not available at the time of trial or if the movant points to evidence in the record that clearly establishes a manifest error of law or fact." *Burritt v. Ditlefsen*, 807 F.3d 239, 252-53 (7th Cir. 2015) (quoting *Matter of Prince*, 85 F.3d 314, 324 (7th Cir. 1996)). Here, plaintiff argues that the court made three such manifest errors of law and fact: (1) in finding waiver for his failure to make any meaningful legal arguments in his opposition brief; (2) by framing this dispute as a "zoning case" or an issue of "mitigation" under zoning ordinances, rather than a "due process case"; and (3) by accepting defendants' version of several, disputed facts.

Plaintiff's arguments are meritless. With respect to his first argument, plaintiff complains that defendants should not have been granted an extension of time in which to file a motion for summary judgment, arguing that it was defendants' own fault for not filing on time. Plaintiff also implies that because defendants received an extension of time to file their motion for summary judgment, he somehow had difficulty making legal arguments in response. Neither argument makes sense. The court acted well within its discretion in extending defendants' deadline to file a motion for summary judgment. Moreover, plaintiff's time for filing his opposition brief was not somehow shortened because defendants received an extension. In fact, plaintiff also asked for, and received, an extension of time in which to file his opposition brief, ultimately giving him nearly two months to do so. Plaintiff offers no reason for his inability to marshal facts or find legal authority to support his claims within that time period. Finally, as the court explained in the September 3 opinion and order, the court proceeded to consider the merits of plaintiff's claims despite his failure to respond to defendants' legal arguments. (Dkt. #85 at 9-19.) Instead of being unfairly prejudiced, plaintiff's claims failed because they were foreclosed by well-established law.

Plaintiff's second argument is equally meritless, since the court's characterization of his claims as a challenge to zoning laws in no way ignored that this challenge was fundamentally one for a denial of his due process rights. Instead, the court accurately explained that plaintiff's claims are based on his allegations that Douglas County officials violated his due process rights *in the context of a dispute about a land use permit*. As the Seventh Circuit has explained repeatedly, "regardless of how a plaintiff labels an objectionable land-use decision (i.e., as a taking or as a deprivation without substantive or procedural due process), recourse must be made to state rather than federal court." *CEnergy–Glenmore Wind Farm # 1, LLC v. Town of Glenmore*, 769 F.3d 485, 489 (7th Cir. 2014). Similarly, this court already explained in significant detail why

plaintiff's objections to Douglas County's actions relating to his land use permit application fail to implicate any constitutional claim reviewable in federal court.

Finally, plaintiff argues that the court improperly accepted defendants' version of certain disputed facts by: (1) misstating his proposed building plans; (2) misunderstanding his dispute about a mitigation fee; (3) failing to acknowledge discrepancies between defendant Rannenberg's deposition and his affidavit; (4) ignoring the important issue of the recording of the Board of Adjustment meeting; and (5) failing to acknowledge the similarities between himself and other individuals who received a permit. These arguments also fail.

Even if there were genuine factual disputes regarding each of these issues, none were *material* to court's legal analysis of plaintiff's claims. As explained in the court's opinion and order, plaintiff could not succeed on a federal takings claim because he had not shown that Douglas County deprived him of property or of "all or substantially all practical uses of the property." He also failed to exhaust his state court remedies. None of the alleged factual disputes he identifies in his motion for reconsideration change either of these legal conclusions.

As for his equal protection claim, plaintiff failed to show that Douglas County's actions lacked a rational basis. In particular, he failed to show the County treated any similarly situated individual more favorably. While plaintiff now argues that the court disregarded similarities between himself and other individuals who received a permit, he continues to neither identify any specific individuals by name with whom he is similarly situated in "all material respects," nor to explain how, *specifically*, they were treated more favorably. *Miller v. City of Monona*, 784 F.3d 1113, 1120 (7th Cir. 2015). As the court already explained, the two permit applicants to whom plaintiff appears to be referring are clearly not similarly situated to plaintiff, as they received land use permits *after* the County amended its shoreland zoning ordinances *and* after plaintiff was told his own permit application would be approved.

Finally, plaintiff's due process claim failed because only minimal process is required for local land use and zoning decisions, and the facts showed that plaintiff received more than minimal process. Additionally, plaintiff did not show that defendants' actions were "arbitrary and capricious," "random and irrational" and "shocked the conscience." *CEnergy-Glenmore*, 769 F.3d at 488.

None of the alleged errors identified by plaintiff undermine this conclusion. Rather, it is abundantly clear from the record that plaintiff received ample process both at the local level and in the state circuit court. Accordingly, plaintiff has not met his burden under Fed. R. Civ. P. 59(e), and his motion will be denied.

ORDER

IT IS ORDERED that plaintiff Barry R. Donohoo's Motion to Alter or Amend the Judgment (dkt. #93) is DENIED.

Entered this 10th day of May, 2016.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge