COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2006–00651

JAMES P. LAMOUNTAIN & others [1]

vs.

TOWNE OF HOLLAND & others [2]

MEMORANDUM OF DECISION AND ORDER ON THE DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

The plaintiffs,[3] in a pro se action, filed a complaint on July 11, 2006, against the Towne of Holland Fire Department, its Fire Chief, and the Towne of Holland Police Department charging that the defendants trespassed on the plaintiffs' property to extinguish fires for agricultural land clearing (Count I) and withheld a permit to conduct agricultural burning (Count II). The defendants moved to dismiss the action on October 19, 2006. Following a hearing on November 28, 2006, the defendants' motion is *ALLOWED* in part and *DENIED* in part.

FACTS

The plaintiffs purchased an eighty-acre parcel zoned for Agriculture ("the Land"), and notified the defendant Towne of Holland ("the Town") of their agricultural intent on May 30, 2006. The plaintiffs proceeded to conduct open burning of brush and trees on the Land for agricultural land clearing. With the assistance of the Towne of Holland Police Department and

---

[1] Chad Brigham, Huguenot Farms Inc., and Northeast Concepts Inc.

[2] Towne of Holland Fire Dept., Paul Foster Fire Chief Individually, and Towne of Holland Police Dept.

[3] The court reminds the plaintiffs that only natural persons may represent themselves in a legal action. It is a "well-established common law principle that corporations must appear and be represented in court, if at all, by attorneys." *Varney Enters.* v. *WMF, Inc.*, 402 Mass. 79, 81–82 (1988) (citations omitted). Therefore, unless Huguenot Farms Inc. and Northeast Concepts Inc. are represented in this action by counsel, they are not proper parties.

Massachusetts State Police, the Towne of Holland Fire Department ("HFD") entered the Land to extinguish the burning, pursuant to 310 Code Mass. Regs. § 7.07(1), which provides, "No person shall cause, suffer, allow or permit the open burning of any combustible material." The plaintiffs claim such entry by the Town constitutes trespass. The plaintiffs claim they are exempt from § 7.07(1) under § 7.07(3) (c), which provides that § 7.07(1) shall not apply to "open burning of brush and trees resulting from agricultural land clearing operations." The plaintiffs claim the defendants have refused to issue an agricultural burning permit, which has caused an administrative order to be issued by the Massachusetts Department of Environmental Regulation (the "DEP").

According to the DEP's Administrative Order dated July 10, 2006,[4] the HFD responded to the Land on May 28, May 30, June 24, and June 27, 2006, and observed the open burning of brush. Plaintiff LaMountain ("LaMountain") did not have a permit from the HFD or DEP to conduct burnings on the Land. The HFD or the occupants of the Land extinguished the fires at the time of each response by the HFD, and the HFD gave verbal warnings not to burn without a permit. In the Administrative Order, the DEP ordered that LaMountain shall not conduct any burning on the Land until he has obtained a written permit from the HFD and otherwise complies with the requirements of 310 Code Mass. Regs. § 7.07(3)(g)1–4.[5]

On July 10, 2006, the HFD filed a complaint with application for a temporary restraining order in the Massachusetts Housing Court, Western Division,[6] charging defendant LaMountain with violation of 310 Code Mass. Regs. § 7.07, and seeking an order to require LaMountain to

---

[4] File No. UAO–WE–06–7002.

[5] "[O]pen burning as described in 310 CMR 7.07(3)(a) through 310 CMR 7.07(3)(f) must be conducted: 1. during periods of good atmospheric ventilation, 2. without causing a nuisance, 3. with smoke minimizing starters if starters or starting aids are used, and 4. under the provisions of a properly executed permit issued under the provisions of M.G.L. c. 48, § 13." 310 Code Mass. Regs. § 7.07(3)(g)1–4.

[6] Case No. 06CV0392, Unilateral Administrative Order No. UAO–WE–06–7001.

cease burning, at least until the DEP determines what type of burning on the Land is permitted by § 7.07. The HFD's complaint stated that the plaintiffs were "causing a smoke nuisance to the adjoining properties," that they were burning "at all hours ... up to 10 p.m.," at which time the HFD was called to extinguish the fires. The complaint stated the plaintiffs had left fires unattended and left flammable liquids (gasoline) on-site. It further stated that LaMountain had ordered his sons to lie down in the road to create a human shield in the event the HFD arrived to extinguish fires, and LaMountain had left "harassing and challenging" messages with the HFD, threatening to continue burning. The complaint stated the HFD had incident reports detailing its five responses to the Land, and each time the Fire Chief ordered the plaintiffs to cease burning. The complaint stated that the Fire Chief had contacted the DEP, which had advised the Fire Chief to extinguish fires if the HFD received a complaint of burning.

The following day, the plaintiffs filed the present action, alleging that the defendants trespassed on the Land on more than five occasions between May 30 and July 11, 2006, and withheld the issuance of a required agricultural burning permit. The plaintiffs also filed an emergency motion for an order to the Town to cease and desist from trespassing on its protected private agricultural property, incorporating the facts of the motion into their complaint. In that motion, the plaintiffs stated that Huguenot Farms Inc. was an agricultural entity as defined in G. L. c. 128, § 1A, and allowed by right under G. L. c. 40A, § 3, because the Land was of greater than five acres and zoned for Agriculture. The plaintiffs stated that its status as an agricultural property was duly communicated to the Town,[7] that it was exempt from § 7.07(1) under § 7.07 (3)(c), and that the plaintiffs had notified the Fire Chief and fire fighters of the agricultural nature

[7] The plaintiffs provided the Town a letter declaring their agricultural intent. They provided Huguenot Farms Inc.'s articles of organization to the Town Clerk, Fire Chief, Chairman of the Board of Selectmen, and the DEP. They provided a declaration of agricultural exemption and a copy of 310 Code Mass. Regs. 7.07 to the Chairman of the Board of Selectmen.

of the burning. The plaintiffs contend that the sole limitation to burning applicable to them under § 7.07 is during "[a]dverse meteorological conditions ... as notified by the department through the news media," and those conditions did not exist at the time of the burning. They allege that the Fire Chief had "made up" permitted hours of burning that were not required under § 7.07(b)–(c). Citing Article XCVII of the Amendments to the Massachusetts Constitution, which states in part, "the protection of the people in their right to the conservation, development, and utilization of the agricultural, mineral, forest, water, air, and other resources is hereby declared to be a public purpose," the plaintiffs aver, "We are being denied our legitimate pursuit of agriculture by the actions of the defendants." The court denied the plaintiffs' motion on July 11, 2006, as not being an emergency.[8]

On July 14, 2006, LaMountain and the HFD executed an Agreement of the Parties as a resolution of the action in the Housing Court, in which LaMountain (1) agreed not to burn until the HFD issues a permit, (2) agreed to comply with the DEP administrative order, (3) acknowledged the need to prove to the HFD and/or DEP that the Land is a working agricultural business, and (4) agreed to cease burning if and when it creates a nuisance to adjoining properties.

On October 6, 2006, the Fire Chief issued LaMountain a permit for agricultural burning, which was effective October 6–31, 2006.

On November 24, 2006, the plaintiffs filed an emergency motion to file a "supplemental complaint" and for an order to compel the defendants to stop trespassing on their property. On the same date, the plaintiffs filed an emergency motion to compel the defendants to issue any agricultural permit as may be required.

---

[8] Josephson, J.

DISCUSSION

A pro se plaintiff's allegations are entitled to a liberal construction no matter how inartfully pleaded. See *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972). When evaluating the sufficiency of a complaint pursuant to Mass. R. Civ. P. 12(b)(6), the court must accept as true the allegations of the complaint, as well as any favorable inferences to be drawn from them. *General Motors Acceptance Corp.* v. *Abington Cas. Ins. Co.*, 413 Mass. 583, 584 (1992); *Nader* v. *Citron*, 372 Mass. 96, 98 (1977). The plaintiff's claim must be based on facts set forth in the complaint. *General Motors Acceptance Corp.*, 413 Mass. at 584. In evaluating a Rule 12(b)(6) motion, the court will "take into consideration the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account." *Schaer* v. *Brandeis Univ.*, 432 Mass. 474, 477 (2000), citing 5A C.A. Wright & A.R. Miller, Federal Practice and Procedure § 1357, at 299 (1990). Although courts do not accept legal conclusions cast in the form of factual allegations, *id.*, a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the complainant can prove no set of facts in support of his claim that would entitle him to relief. *Nader,* 372 Mass. at 98. A complaint should not be dismissed if it could support relief on any theory of law. *Whitinsville Plaza, Inc.* v. *Kotseas*, 378 Mass. 85, 89 (1979) (citations omitted); *Nader*, 372 Mass. at 104.

1. Count I – Trespass

At common law, the Commonwealth is not liable for the tort of trespass. *Dinsdale* v. *Commonwealth*, 39 Mass. App. Ct. 926, 927 (1995). "Intentional torts are expressly exempted from the [Massachusetts Tort Claims] Act, and therefore a public employer cannot be sued for its employee's intentionally tortious conduct." *Nelson* v. *Salem State College,* 446 Mass. 525, 537

(2006); see G. L. c. 258, § 10 (c). Thus, the Town Fire Department and Police Department, as public employers, are not liable for the tort of trespass. See *id.*

Under the Act, "individual defendants in their official capacities are immune from intentional tort claims under G. L. c. 258, § 10 (c)." See *id.* at n.9. Here, the Fire Chief is being sued as an individual and not in his official capacity, so the Act does not apply. However, "public employees may be personally liable for their intentionally tortious conduct ... ." *Id.* at 537; *Spring* v. *Geriatric Auth. of Holyoke*, 394 Mass. 274, 286 n.9 (1985).

The Fire Chief acting in his individual capacity was privileged to enter the Land to extinguish brush fires and so is not liable for the tort of trespass. The right of a possessor of property is limited by a fireman's privilege to enter the property, by reason of public necessity. *Aldworth* v. *F. W. Woolworth Co.*, 295 Mass. 344, 345–346 (1936) (fireman's entry was permitted by virtue of a privilege conferred by law and constituted him a licensee); *Parker* v. *Barnard*, 135 Mass. 116, 117 (1883) (entry onto land is a limitation of property owner's rights justified by the protection of owner's property and of the public); *Inhabitants of Hyde Park* v. *Gay*, 120 Mass. 589, 593 (1876) (town not a trespasser when it entered the land to prevent the spread of fire). The court concludes that in entering the Land to extinguish open brush fires upon complaints of nuisance by adjoining properties, where the plaintiffs did not have a permit to burn and had been ordered by the Fire Chief not to burn, and whereas the DEP advised the HFD to extinguish complained-of burning on the Land, the Fire Chief was acting under a privilege of public necessity. As such, the Fire Chief is not liable for the tort of trespass.

2. Count II – Withholding issuance of permit

The claim that the defendants withheld a permit to which the plaintiffs were entitled is not pled under a cause of action cognizable in the Commonwealth. However, claims of the denial

of a permit have been brought under 42 U.S.C. § 1983 in Massachusetts courts. See *Freeman* v. *Planning Bd. of West Boylston*, 419 Mass. 548, 557–558 (1995) (based on violation of due process); *Zegouros* v. *City Council of Fitchburg*, 381 Mass. 424, 428 (1980) (same); *Rzeznik* v. *Chief of Police*, 374 Mass. 475, 484–485 (1978) (based on violation of First Amendment). The Federal Civil Rights Act, 42 U.S.C. § 1983, protects individuals against deprivations of federally protected rights by those acting under color of state law. *Gaffney* v. *Silk*, 488 F.2d 1248, 1250 (1st Cir. 1973). Under § 1983, any person "who, under color of any statute ... subjects ... any citizen of the United States ... to the deprivation of any rights ... secured by the Constitution ... shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." See *Rzeznik,* 374 Mass. at 484 n.8. The Supreme Court has held that when it is official government policy that constitutes the violation of § 1983, a municipality is subject to suit under that section. See *Zegouros*, 381 Mass at 428, citing *Monell* v. *Department of Social Servs. of the City of N.Y.,* 436 U.S. 658 (1978). The Supreme Court has held that § 1983 is applicable to the unlawful deprivation of property rights. *Gaffney*, 488 F.2d at 1250.

Here, the denial of a permit to conduct agricultural burning is a government policy decision. See *Zegouros*, 381 Mass at 428. The plaintiffs claim that they complied with all requirements of law to secure a permit and yet were denied its issuance, depriving them of a legitimate and protected right to the pursuit of agriculture. These allegations are enough to support a cause of action for a denial of due process. See *id.* (citation omitted). "Thus, since the elements of a Section 1983 action have been pleaded, this theory must be allowed to go [forward] although the section is not explicitly mentioned in the complaint." See *id.* See *Whitinsville Plaza, Inc.*, 378 Mass. at 89 (a complaint should not be dismissed if it could support relief on any theory of law).

The judicial doctrine of collateral estoppel, or issue preclusion, may not be applied to dismiss the plaintiff's claim that he was denied a permit to burn, because this issue was not the subject of any earlier adjudication. "Issue preclusion may be used defensively if (1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom estoppel is asserted was a party (or in privity with a party) to the prior adjudication; (3) the issue in the prior adjudication is identical to the issue in the current adjudication; and (4) the issue decided in the prior adjudication was essential to the earlier judgment. *Green* v. *Town of Brookline*, 53 Mass. App. Ct. 120, 123 (2001) (citations omitted). "[A] final order of an administrative agency in an adjudicatory proceeding ... precludes relitigation of the same issues between the same parties, just as would a final judgment of a court of competent jurisdiction." *Id.* at 123–124 (citations omitted). Although both the DEP Administrative Order and the Land Court judgment determined that LaMountain shall not conduct any burning on the Land until he has obtained a written permit from the HFD, neither prior adjudicatory proceeding addressed the claim that LaMountain was denied a permit. Because the prerequisite that "the issue in the prior adjudication is identical to the issue in the current adjudication" is not satisfied, the doctrine of collateral estoppel is inapplicable. See *Id.* at 123.

ORDER

For the foregoing reasons, it is **ORDERED** that the defendants' motion to dismiss is **ALLOWED** as to Count I, trespass, and **DENIED** as to Count II, withholding of a permit.

DATED: December 5, 2006.

Cornelius J. Moriarty II
Justice of the Superior Court