

H**Motions, Pleadings and Filings**

Only the Westlaw citation is currently available.

United States District Court,
E.D. Pennsylvania.

F.A. PROPERTIES CORPORATION

v.

CITY OF PHILADELPHIA; Thorne Equipment Co.;
Officer Rankin, badge No. 4000

Individually and as a Police Officer of the City of
Philadelphia; Officer

Wilson, badge No. 2647, Individually and as a Police
Officer of the City of

Philadelphia; and Robert Solvible, Chief, Contractual
Services Unit,

Department of Licenses and Inspections, City of
Philadelphia.

Civil Action No. 96-1248.

NO. 96-1248.

March 21, 1997.

Padova, District Judge.

MEMORANDUM

*1 Plaintiff, F.A. Properties Corporation ("F.A.Properties") brings this action against the City of Philadelphia ("City") and several co-Defendants [\[FN1\]](#) for money damages, alleging the wrongful demolition of a property formerly located at 761-765 North 47th St. in Philadelphia ("Property"). Before the Court is Defendants' Motion for Summary Judgment. For the reasons that follow, the Motion is granted.

[\[FN1\]](#). Defendants in this case are Thorne Equipment Corporation ("Thorne"), alleged demolisher of the Property under City contract, City Police Officers Rankin ("Rankin") and Wilson ("Wilson"), who were present at the demolition, and Robert Solvible, Chief of the Contractual Services Unit of the City Department of Licenses and Inspection ("Solvible"). By Order of the Court dated March 14, 1997, Thorne was granted leave to

file a Motion for Summary Judgment. (*See* Doc. No. 84). Thorne adopts most of the City's arguments by reference.

I. Facts

Prior to the events that form the basis of this suit, the Property was damaged by fire. The Property was then cited by the City Department of Licenses and Inspections with violations of Title 4 and Title 7 of the City Code of General Ordinances ("Code") for "fire damage to the main roof assembly," which left "the walls without lateral support." (Revised Am. Compl. ¶ 14(a)). Furthermore, the City contended that "the premises were vacant, open and a public nuisance." (*Id.* ¶ 14(b)).

On the basis of the aforementioned Code violations, in June 1993, the City initiated an action in the Court of Common Pleas of Philadelphia County ("Court of Common Pleas") seeking a permanent injunction requiring the owners of the Property to remedy the Code violations. On August 17, 1993, the Court of Common Pleas, "by agreement of all parties," entered such an order and instructed that it be carried out by September 29, 1993 at 9:30AM. [\[FN2\]](#) On November 5, 1993, the Court of Common Pleas entered a second order, also "by agreement of all parties," which was substantially similar to the August order, with the exception that this second order provided that if the required remediation were not completed by November 24, 1993 at 9:30AM, the City would be authorized to demolish the Property. [\[FN3\]](#) On November 24, 1993, a proceeding was held before Judge Gene D. Cohen of the Court of Common Pleas, pursuant to which on December 1, 1993, Judge Cohen issued a demolition order ("Demolition Order"). [\[FN4\]](#) On December 31, 1993, F.A. Properties filed a petition to vacate the Demolition Order. (*See* Pl.'s Mem. Opp. Mot. Summ. J. Ex. J.) ("Pl.'s Mem."). On February 1, 1994, the City filed a response to F.A. Properties' petition. (*See* Pl.'s Mem. Ex. K).

[\[FN2\]](#). That Order read, in relevant part, as follows: F.A. Properties Corporation ... shall take whatever action necessary to correct all violations of Title 7 (Housing) of the Philadelphia Code of Ordinances existing at the subject premises ... including, but

not limited to, the elimination of the present public nuisance (§ 7-600) by: (1) cleaning, sealing, and continuing to monitor the subject premises, and (2) either commencing rehabilitation, providing concrete plans for rehabilitation, or producing an agreement of sale to a party willing and able to rehabilitate the premises.... The rehabilitation ... shall meet the requirements of Title 4 of the Philadelphia Code, including, but not limited to, obtaining all required permits and licenses. The defendants shall allow the subject premises to be inspected by the Department of Licenses and Inspections

to determine whether the imminently dangerous conditions have been corrected.

(Defs.' Mem. Supp. Mot. Summ. J. Ex. B ¶¶ 1-2) ("Defs.' Mem.").

[FN3](#). That Order read, in relevant part, as follows:

F.A. Properties Corporation ... shall take whatever action is necessary to correct all violations of Title 7 (Housing) of the Philadelphia Code of Ordinances existing at the subject premises located at 761 and 765 North 47th Street, in the City of Philadelphia, as specifically set forth in the Violation Notices attached to the Complaint, including but not limited to the masonry sealing all basement and first floor doors and windows.... The rehabilitation shall meet the requirements of Title 4 of the Philadelphia Code, including, but not limited to, obtaining all required permits and licenses. The defendants shall allow the subject premises to be inspected by the Department of Licenses and Inspections to determine whether the imminently dangerous conditions have been corrected.... If defendants have not made the [above] corrections ... the Department of Licenses and Inspections, and/or its contractors, shall be authorized to enter the subject premises and eliminate the specified Code Violations by demolishing the subject premises.

(Defs.' Mem. Ex. B ¶¶ 1, 2, 5).

[FN4](#). The Demolition Order read, in relevant part,

as follows:

1. The Department of Licenses and Inspections, and/or its contractors, shall be authorized to enter the subject premises and eliminate Code Violations by demolishing the subject premises, located at 761-765 North 47th Street, Philadelphia, Pennsylvania. The defendants shall allow representatives of the City, including any contractors hired by the City, to enter the subject premises for the purpose of making said demolition.

* * *

4. The Sheriff of Philadelphia County and, if requested, the Philadelphia Police Department, shall assist the Department of Licenses and Inspections in carrying out the terms of this Order.

5. The terms of this Order shall be binding on the defendants, their agents, servants, employees and all persons acting in or for defendants [] behalf or occupying the subject premises.

(Defs.' Mem. Ex. A)

On February 21, 1994, which was Presidents' Day, a public holiday, F.A. Properties obtained an emergency order ("Emergency Order") from Court of Common Pleas Judge Joseph I. Papalini, acting in his capacity as Emergency Judge, which purported to enjoin the City from demolishing the Property. [\[FN5\]](#) On that same day, February 21, 1994, in spite of the Emergency Order and while the petition to vacate was still pending, the City demolished the Property. [\[FN6\]](#) On March 1, 1995, Judge Cohen denied F.A. Properties' petition to vacate. (*See* Defs.' Mem. Ex. F). On April 7, 1995, F.A. Properties filed a notice of appeal to the Superior Court of Pennsylvania from Judge Cohen's denial of the petition to vacate. (*See* Defs.' Mem. Ex. G). On May 24, 1995 Judge Cohen handed down an opinion explaining his denial of the petition to vacate. (*See* Defs.' Mem. Ex. H). On August 30, 1995, F.A. Properties' appeal to the Superior Court of Pennsylvania was dismissed for failure of F.A. Properties to file a brief. (*See* Defs.' Mem. Ex. I).

[FN5](#). The Emergency Order read, in relevant part, that: "it is hereby ordered that Plaintiff, City of Philadelphia, cease and desist in the demolition of

premises, 761-765 North 47th Street, Philadelphia, PA until Friday Feb 25, 1994." (Defs.' Mem. Ex. E).

FN6. F.A. Properties contends that it took the Emergency Order to the site of the Property and presented it to certain Defendants *before* the demolition took place. F.A. Properties contends, therefore, that Defendants willfully ignored the Emergency Order. Defendants dispute this narrative. (See Defs.' Mem. at 3 n. 1). However, for purposes of adjudicating the instant Motion, the Court shall accept as true F.A. Properties' version of events.

*2 F.A. Properties' Revised Amended Complaint presents six claims. Count I is a claim for negligence, carelessness, and recklessness against the City arising out of, *inter alia*: 1) the failure of its employees to comply with the Emergency Order; 2) its failure to inspect the condition of the Property to determine its actual condition prior to demolition, and; 3) its failure to "obtain accurate reports or studies of the condition of [the P]roperty so as to verify its actual condition prior to demolition, and reliance on inadequate and deficient reports as to the condition of [the P]roperty." (Revised Am. Compl. ¶ 21). Count II asserts negligence, carelessness, and recklessness against Thorne, arising out of the failure of its employees to heed the Emergency Order.

Count III maintains a similar negligence, carelessness and recklessness claim against Wilson and Rankin for their failure to heed the Emergency Order. Count IV alleges Solvible acted with gross negligence in failing to desist in the demolition. Count VI presents a cause of action under [42 U.S.C.A. § 1983](#) (West 1994) against Rankin, Wilson, Thorne and Solvible. Count VII presents a due process claim under the Fourteenth Amendment to the United States Constitution.

Plaintiffs seek compensatory and punitive damages in excess of \$100,000 as well punitive damages, costs and attorney's fees.

II. Legal Standard

[Fed.R.Civ.P. 56\(c\)](#) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." [Fed.R.Civ.P. 56\(c\)](#). An issue is "genuine" only if there is sufficient evidence with which a reasonable jury could find for the non-moving party. See [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Furthermore, bearing in mind that all uncertainties are to be resolved in favor of the nonmoving party, a factual dispute is only "material" if it might affect the outcome of the case. *Id.* A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. See [Celotex Corp. v. Catrett](#), 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Where the nonmoving party bears the burden of proof on a particular issue at trial, the movant's initial *Celotex* burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." *Id.* at 325, 106 S.Ct. at 2554. After the moving party has met its initial burden, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322, 106 S.Ct. at 2552.

III. Discussion

A. No Violation of State Process

*3 F.A. Properties contends that Defendants violated state law by demolishing the Property in the face of the Emergency Order which expressly stayed that demolition. Defendants respond that the Emergency Order was void *ab initio* as a matter of state law and that, therefore, Defendants did not offend either state or federal law when they failed to comply with its terms. I agree with Defendants.

[42 Pa. Cons.Stat. Ann. § 5505](#) (West 1981) ("[§ 5505](#)") provides that "[e]xcept as otherwise provided or prescribed

by law, a court upon notice to the parties may modify or rescind any order within 30 days after its entry, notwithstanding the prior termination of any term of court, if no appeal from such order has been taken or allowed." Pennsylvania courts interpret this provision as follows: "[a]s a general rule, a trial court *may not modify* a final order beyond the thirty day statutory time limit...." [Commonwealth v. Dasilva](#), 440 Pa.Super. 291, 655 A.2d 568, 571-72 (Pa.Super.Ct.1995) (emphasis added) (citing, *inter alia*, [§ 5505](#)); [Orie v. Stone](#), 411 Pa.Super. 481, 601 A.2d 1268, 1270 (Pa.Super.Ct.1992) ("[a] judgment entered in an adverse proceeding [as opposed to, for example, a default judgment] becomes final if no appeal therefrom is filed within thirty days. Thereafter, the judgment cannot normally be modified, rescinded or vacated") (citing, *inter alia*, [§ 5505](#)), *appeal granted*, 530 Pa. 660, 609 A.2d 168 (1992), *appeal dismissed as improvidently granted*, 533 Pa. 315, 622 A.2d 286 (Pa.1993); [Commonwealth v. Cook](#), 359 Pa.Super. 216, 518 A.2d 858, 860-61 (Pa.Super.Ct.1986) (finding "the lower court was without the power to reconsider the ... [o]rder beyond the thirty day period") (citing [§ 5505](#)). [FN7] F.A. Properties cites no authority to support the proposition that the filing of a petition to vacate, which in this case appears to be no different than a motion for reconsideration, *automatically* tolls the thirty-day [§ 5505](#) window. [FN8] On the contrary, "a trial court cannot stay any or all proceedings unless they grant the motion for reconsideration [within the thirty-day window]." [Sidkoff, Pincus, Greenberg & Green, P.C. v. Pennsylvania Nat'l Mut. Cas. Ins. Co.](#), 521 Pa. 462, 555 A.2d 1284, 1288 (Pa.1989). Not even the timely filing of an appeal tolls the 30-day period within which the trial court has the power to modify its own order. [In Re Greist](#), 431 Pa.Super. 188, 636 A.2d 193, 195 (Pa.Super.Ct.1994) ("it is wellsettled that ... a trial court maintains jurisdiction to reconsider an order for up to 30 days even where an appeal has been filed") (citing [Pa. R.App. P. 1701\(b\)\(3\)](#)).

[FN7]. The statutory limitation contained in [§ 5505](#) applies only to "final," not "interlocutory," orders. [Commonwealth v. Nicodemus](#), 431 Pa.Super. 342, 636 A.2d 1118, 1120 (Pa.Super.Ct.1993) (citations omitted). "Generally, a final [o]rder is one which ends the litigation or disposes of the entire case.

The finality of an [o]rder is a judicial conclusion which can be reached only after an examination of its ramifications." *Id.* (citations omitted). *See also* [Pa. R.App. P. 341\(b\)\(1\)](#) (stating that a final order is one which "disposes of all claims or of all parties").

F.A. Properties argues that [§ 5505](#) does not apply because the Demolition Order "was not final." It cannot be reasonably argued, however, that the Demolition Order was anything other than final given that it disposed of all claims then outstanding between the City and F.A. Properties. In fact, the Court can hardly imagine a more final order than one which authorizes the physical destruction of the real property which is the subject of suit.

[FN8]. F.A. Properties failed to request a stay. Furthermore, F.A. Properties cites [Pa. R. Civ. P. 1531\(c\)](#) as authorizing its petition to dissolve the injunction. This provision, while indeed authorizing such a motion, conspicuously fails to provide for the automatic entry of a stay upon the filing of the motion.

Thus, once the Demolition Order was entered, barring the granting of F.A. Properties' petition for reconsideration within thirty days, the only way for F.A. Properties to prevent the Demolition Order from becoming final was to file an appeal within thirty days from the entry of the Order. [42 Pa. Cons.Stat. Ann. § 5571](#) (West 1981) ("[§ 5571](#)") ("an appeal from a tribunal or other government unit to a court or from a court to an appellate court must be commenced within 30 days after the entry of the order from which the appeal is taken, in the case of an interlocutory or final order"); [Greist](#), 636 A.2d at 195 ("[i]n order to preserve the right to appeal from an order which finally adjudicates a dispute between litigants, it is beyond question that the appeal must be filed within 30 days of the date of the order") (citing [Pa. R.App. P. 903\(a\)](#)).

*4 Given that (1) Judge Cohen did not grant the petition for reconsideration within thirty days of the entry of the Demolition Order and (2) F.A. Properties did not lodge an appeal within thirty days of the entry of the Demolition Order--by January 1, 1994 at the latest--the Demolition

Order became final. At that point, the Court of Common Pleas no longer had jurisdiction to modify the Order. [\[FN9\]](#) [Crawford v. Burrill](#), 448 Pa.Super. 250, 671 A.2d 689, 692 n. 2 (Pa.Super.Ct.1995) ("[o]n April 19, 1995, the trial court rescinded its prior order of August 31, 1994, and withdrew its grant of a new trial. As the common pleas court was without jurisdiction to act in that ... the order of April 19, 1995 is a nullity and merits no further discussion") (emphasis added) (citing [§ 5505](#)), appeal denied, [545 Pa. 652, 680 A.2d 1161](#) (Pa.1996); [Commonwealth v. Facer](#), 447 Pa.Super. 352, 669 A.2d 385, 386 (Pa.Super.Ct.1995) (holding that once trial court discharged appellant from probation, and once thirty days passed after entry of that order with no appeal filed, the court "lacked the jurisdiction to enter any other order") (emphasis added); [Vanleer v. Lerner](#), 384 Pa.Super. 558, 559 A.2d 577, 578 (Pa.Super.Ct.1989).

[FN9](#). See [Dep't of Transp., Bureau of Driver Licensing v. Axson](#), 143 Pa.Cmwlt. 99, 598 A.2d 616, 619 (Pa.Comm. Ct.1991) for a list of those limited circumstances which would justify the modification of an order even after the 30 day window has closed, none of which the Court considers applicable in the instant case.

F.A. Properties does not cite, and I have not found, any authority to support the proposition that Judge Papalini retained, until February 21, 1994, the authority that Judge Cohen surrendered pursuant to [§ 5505](#) by January 1, 1994. For these reasons, I conclude that the Emergency Order was void *ab initio*. Given the nullity of the Emergency Order, Defendants' failure to abide by it could not have been a violation of state law.

F.A. Properties collaterally attacks the validity of the Demolition Order by arguing that because it had no notice that there was to be a hearing on November 24, 1993, any order that resulted from that hearing was invalid. It is not disputed that neither F.A. Properties nor its counsel were in attendance at the November 24, 1993 hearing. The only question, therefore, is whether F.A. Properties received notice that there was to be a hearing on that date. I believe it did.

In her sworn affidavit, Agnes Atuahene, President and majority shareholder of F.A. Properties, states that at the October 28, 1993 hearing "the parties reached a limited agreement, that was stated on the record as follows ... [:] '(3) F.A. Properties agreed to pay \$500.00 in finance within 30 days, with a return date of November 24, 1993.'" (Aff. of Agnes Atuahene, affixed to Pl.'s Mem., ¶ 9) (emphasis added). An examination of the transcript of the October 28, 1993 hearing confirms the sworn statement of Mrs. Atuahene that, indeed, a return date of November 24 was announced in open court. (See Tr. Hearing 10/28/93, Defs.' Mem. Ex. C at 3). Furthermore, the transcript of that October 28, 1993 hearing notes--on the very first page--the presence of Jerome H. Lacheen, Esq., attorney for F.A. Properties. (See *id.* at 1). F.A. Properties points to no evidence which would controvert this finding.

*5 F.A. Properties further contends that the Demolition Order was invalid in that it violated [Pa. R. Civ. P. 1517\(a\)\(4\)](#) (an "adjudication shall consist of ... (4) a decree nisi") ("[Rule 1517\(a\)\(4\)](#)"). I do not believe that the failure of the Demolition Order to comply with [Rule 1517\(a\)\(4\)](#), however, is ample grounds for its vitiation. Pennsylvania courts have not invalidated orders for their failure to comply with the technical requirement of that Rule. [Burrell Educ. Ass'n v. Burrell Sch. Dist.](#), 674 A.2d 348, 350 n. 4 (Pa.Comm. Ct.1996) ("the [appellant] could have foregone filing a post-trial motion and directly appealed to this [c]ourt from the order granting the permanent injunction, since nothing in the order indicated that it was not a final order; that is, no decree nisi was entered as required by" [Rule 1517\(a\)\(4\)](#)) (citing *inter alia*, [May](#), *infra*)); [Trinity Lutheran Evangelical Church v. May](#), 112 Pa.Cmwlt. 557, 537 A.2d 38, 41 (Pa.Comm. Ct.1988) (finding *inter alia*, that failure of trial court to label order as "decree nisi" in accordance with [Rule 1517\(a\)\(4\)](#) supported finding that order was final for procedural purposes). If anything, [May](#) and [Burrell](#) support the proposition that the failure of a court to comply with [Rule 1517\(a\)\(4\)](#), i.e., to explicitly label orders provisional, militates in favor of finding that the orders were final.

In support of its position on [Rule 1517\(a\)\(4\)](#), F.A. Properties cites an inapposite case, [School Dist. of](#)

Pittsburgh v. Pittsburgh Fed'n of Teachers, 486 Pa. 365, 406 A.2d 324, 328 (Pa.1979). In *Pittsburgh Fed'n*, which does not even mention Rule 1517(a)(4), the trial court enjoined the strike activity of a teachers' union and later cited that union for purported violations of the injunction. On appeal, the Pennsylvania Supreme Court held that as the injunction partially involved a restriction on the freedom of expression, it was subject to the terms of Pa. R. Civ. P. 1531(f)(1) ("Rule 1531(f)(1)") which requires the trial court, after the issuance of a preliminary injunction implicating freedom of expression, to hold a final hearing within three days of the issuance of that preliminary injunction *or* that injunction automatically dissolves. The School District argued that the injunction was final in the first place, rather than preliminary, and that therefore it was not subject to Rule 1531(f)(1).

The Pennsylvania Supreme Court rejected that argument on the grounds that: (1) the original complaint by the School District only requested a preliminary, rather than a permanent, injunction; (2) references throughout the proceeding were strictly to a preliminary injunction and; (3) "[t]he decree entered by the trial court was specifically designated as a preliminary injunction." Pittsburgh Fed'n, 406 A.2d at 328. The *Pittsburgh Fed'n* Court unremarkably held that to describe an injunction--which only ever purported to be preliminary--as final would have been a total non sequitur. F.A. Properties relies heavily on the *Pittsburgh Fed'n* Court's statement that "[w]ithout proper notice and in the absence of an agreement a hearing scheduled to consider the propriety of issuing a preliminary injunction cannot be considered later to have been a final hearing." *Id.*

*6 There is simply no evidence, however, that the November 24, 1993 hearing had ever been described or conceived of as a hearing on a preliminary injunction. [FN10] Quite the contrary, the Demolition Order was captioned, in bold, capital letters, "PERMANENT INJUNCTION," (Defs.' Mem. Ex. A), and F.A. Properties itself styled its December 31, 1993 Motion as "Petition to Vacate *Permanent Injunction*." (Pl.'s Mem. Ex. J) (emphasis added).

[FN10] *Pittsburgh Fed'n* does, however, bear some

relevance to the instant case. To wit, it provides additional support for the principle relied upon *supra*; namely, that an order issued without jurisdiction is void *ab initio*. 406 A.2d at 325 (because trial court entered order imposing fines after injunction which formed basis for contempt order had automatically dissolved pursuant to Rule 1531(f)(1) "there was no court order in effect").

F.A. Properties stated at oral argument on the instant Motion that the linchpin of its common law claims was Defendants' duty to have heeded the Emergency Order. (Tr. Oral Argument 3/14/97 (Doc. No. 85) at 32-4). Further, F.A. Properties has not pointed to, nor can I find, anything in the record which would support the existence of a duty undergirding the common law claims other than that relating to the Emergency Order. Therefore, F.A. Properties' non-federal claims fail.

B. Assuming Violations of State Process

Even assuming the procedural errors in the application of state law alleged by F.A. Properties, those errors, if they existed, would not give rise to due process violations because there were (and still are) state remedies available to correct those errors. [FN11] In short, even if the Emergency Order had been valid, F.A. Properties is still unable to sustain a due process claim. Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984).

[FN11] Much of the discussion in this latter half of the Memorandum focuses on the opportunities that F.A. Properties has or had to seek redress for its grievances in the state courts. The existence of corrective state remedies is irrelevant when the § 1983 claim is based either on a violation of a specific constitutional right, such as freedom of speech, or on substantive due process. Zinermon v. Burch, 494 U.S. 113, 125-26, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990). However, when the § 1983 claim is based on alleged violations of procedural due process, as is the case here, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. "This inquiry would examine ... any remedies for

erroneous deprivations provided by statute or tort law." *Id.* (citations omitted).

In *Hudson*, an inmate at a Virginia prison brought a [§ 1983](#) action alleging that a guard intentionally destroyed his property without due process of law. The Supreme Court of the United States held that:

an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available. For intentional ... deprivations of property by state employees, the state's action is not complete until it provides or refuses to provide a suitable postdeprivation remedy.

Id. at 533, [104 S.Ct. at 3204](#). [FN12] In *Hudson*, the Supreme Court was satisfied that under Virginia tort law, the inmate would be able to recover the value of the property destroyed and that, therefore, no due process claim was to be had. The inmate had argued that the loss of his personal property was "incompensable" and that, therefore, there was no adequate postdeprivation remedy available. F.A. Properties has not argued that the loss of the Property is uncompensable. In any event, the Supreme Court rejected the *Hudson* inmate's uncompensability argument for two reasons. In the first instance, the Court found that "[i]f the loss is 'incompensable,' this is as much so under [§ 1983](#) as it would be under any other remedy." *Id.* at 535, [104 S.Ct. at 3204](#). Secondly, the Court stated, the fact that a plaintiff "might not be able to recover under these [state] remedies the full amount which he might receive in a [§ 1983](#) action is not ... determinative of the adequacy of the state remedies." *Id.*, [104 S.Ct. at 3204-05](#). [FN13]

[FN12]. In *Logan v. Zimmerman Brush Co.*, [455 U.S. 422, 436, 102 S.Ct. 1148, 1158, 71 L.Ed.2d 265 \(1982\)](#), it was held that a postdeprivation state remedy is insufficient to satisfy the demands of due process where the property deprivation is effected pursuant to an established state procedure. *Hudson* only applies where the "loss of property is occasioned by a random, unauthorized act by a state employee ... [where] the state cannot predict when the loss will occur." [468 U.S. at 532, 104](#)

[S.Ct. at 3203](#). F.A. Properties does not contend that Defendants acted pursuant to an established state procedure (of flouting orders issued by the Court of Common Pleas) when they allegedly ignored the Emergency Order.

[FN13]. The United States Court of Appeals for the Third Circuit has noted that *Hudson* did not foreclose the possibility of a substantive due process violation even in the presence of procedurally adequate postdeprivation process. [Davidson v. O'Lone](#), [752 F.2d 817, 825 \(3d Cir.1984\)](#), *aff'd*, [474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 \(1986\)](#); *see also Bello v. Walker*, [840 F.2d 1124, 1129 \(3d Cir.1988\)](#) (reviewing Supreme Court and Third Circuit jurisprudence and stating that it is "the deliberate and arbitrary abuse of government power [which] violates an individual's right to substantive due process"), *cert. denied*, [488 U.S. 868, 109 S.Ct. 176, 102 L.Ed.2d 145 \(1988\)](#). The Court does not address the question of substantive due process in the instant case, however, as it has not been developed by F.A. Properties.

*7 F.A. Properties had--and may still have--an array of state postdeprivation remedies at its disposal, including a contempt order from Judge Papalini for violations of the Emergency Order. *See Brocker v. Brocker*, [429 Pa. 513, 241 A.2d 336, 339 \(Pa.1968\)](#) ("the court may, in a proceeding for civil contempt, impose the remedial punishment of a fine payable to an aggrieved litigant as compensation for the special damages he may have sustained by reason of the contumacious conduct of the offender"), *cert. denied*, [393 U.S. 1081, 89 S.Ct. 857, 21 L.Ed.2d 773 \(1969\)](#) (citations and quotation marks omitted). Alternatively, F.A. Properties could have brought a suit in tort, as the Supreme Court noted the *Hudson* plaintiff could have. [FN14] The fact that F.A. Properties did not, or does not, pursue these remedies because, for example, state law deadlines contained in [§§ 5505](#) and [5571](#) for pursuing them may have passed is not creative of a due process violation. As the Supreme Court stated in *Logan*:

[FN14]. The very fact that F.A. Properties now

brings a series of common law claims for violations of the Emergency Order belies any contention that state law affords no adequate remedies.

[t]he state may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations ... or filing fees. And the state certainly accords *due* process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule. What the Fourteenth Amendment does require, however, is an *opportunity* ... granted at a meaningful time and in a meaningful manner for [a] hearing appropriate to the nature of the case.

[455 U.S. at 437](#), [102 S.Ct. at 1158-59](#) (citations and quotation marks omitted).

The foregoing analysis applies to F.A. Properties' position concerning alleged procedural defects in the November 24, 1993 hearing. F.A. Properties concedes that it received the Demolition Order--entered on December 1, 1993--no later than December 15, 1993. (See Tr. Oral Argument 3/14/97 at 19-20). Thus, under [§ 5571](#), on December 15, 1993, F.A. Properties still had two weeks within which to appeal. [Luckenbaugh v. Shearer](#), [362 Pa.Super. 9, 523 A.2d 399, 401-02 \(Pa.Super.Ct.1987\)](#) (implying that where appellee learned by April 1 of entry of adverse order on March 20, appellee still had ample time, in the context of thirty-day window, within which to file appeal and, by so doing, to stay finality of trial court order), *appeal denied*, [518 Pa. 626, 541 A.2d 1138 \(Pa.1988\)](#). On appeal to the Superior Court, F.A. Properties could have collaterally attacked the Demolition Order on the grounds that it represented an order resulting from a hearing which F.A. Properties had no notice of. Because F.A. Properties had an *opportunity*--even though it failed to exploit it--to correct the notice infirmity within the state system, there is no due process violation. [\[FN15\]](#) Similarly, the alleged defects arising out of F.A. Properties' contention that the Demolition Order was improperly deemed a permanent injunction--and should have actually been a preliminary injunction-- was a matter that should have, and could have, been properly raised on state appeal. *Logan* equally disposes of all the miscellaneous other procedural imperfections in the entry of

the Demolition Order that F.A. Properties either raised in its briefing or at oral argument.

[FN15](#). If, for example, the Demolition Order had been entered without notice and there existed no remedy for that failing in the state system, there might well be a due process violation.

*8 It is neither the duty nor the prerogative of this Court to sit in judgment of procedural errors committed by state courts under state law which may or may not have befallen F.A. Properties. I am simply tasked here with insuring that whatever transpired in the state system did not offend the procedural due process to which F.A. Properties is entitled under the Federal Constitution. [\[FN16\]](#)

[FN16](#). Because I have found that even assuming: (1) Thorne was a state actor and (2) the Emergency Order, on its face, included Thorne, that Thorne would still be entitled to summary judgment, I do not reach Thorne's alternative defenses.

An appropriate Order follows.

ORDER

AND NOW, this 21st day of March 1997, upon consideration of City Defendants' Motion for Summary Judgment and supporting Memorandum (Doc. No. 75), Defendant Thorne's Motion for Summary Judgment and supporting Memorandum (Doc. No. 78), Plaintiff's Memorandum in Opposition (Doc. No. 80), City Defendants' Reply (Doc. No. 81), and a hearing held on March 14, 1997, IT IS HEREBY ORDERED THAT

1. City Defendants' Motion IS GRANTED.
2. Defendant Thorne's Motion IS GRANTED.
3. Judgment is entered IN FAVOR of all Defendants AGAINST Plaintiff.
4. The Clerk of Court shall mark this case CLOSED.

Motions, Pleadings and Filings ([Back to top](#))

- [2:96CV01248](#) (Docket) (Feb. 20, 1996)

Not Reported in F.Supp.

--- F.Supp.2d ---

(Cite as: **1997 WL 136439 (E.D.Pa.)**)

END OF DOCUMENT