

COMMONWEALTH OF MASSACHUSETTS.

APPEALS COURT FOR THE COMMONWEALTH,

At Boston, October 4,

1995

IN THE CASE OF

ALFRED NELSON & others

vs.

COMMONWEALTH & another.

pending in the Superior

Court for the County of Barnstable

ORDERED, that the following entry be made in the docket; viz,—

Judgment affirmed.

By THE COURT,

Nancy Ann Foley, CLERK

October 4, 1995.

NOTE:

This original of the within rescript
will issue in due course, pursuant
to M.R.A.P. 23

APPEALS COURT

OVER

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

94-P-1134

ALFRED NELSON & others¹

vs.

COMMONWEALTH & another.²

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This case arises from flooding of waterfront properties after a storm in January, 1987, caused a breach in Nauset Beach in Chatham Harbor. See generally, Wilson v. Commonwealth, 31 Mass. App. Ct. 757, 758-759, S.C., 413 Mass. 352 (1992) (A.167). The plaintiffs appeal (A.312) from the dismissal of their complaint, filed in 1993, by a judge of the Superior Court who ordered the dismissal principally on grounds of res judicata, claim and issue preclusion (A.308). The same judge ordered the dismissal of an earlier complaint, filed in 1990,³ and described that complaint as "seek[ing] recovery against the defendants

¹ Evelyn Nelson, Lewis Hicks III, and Bernice Hicks.

² Town of Chatham.

³ Before ordering dismissal of the complaint, the judge declared the validity and constitutionality of 310 Code Mass. Regs. §§ 10.28 and 10.30 (1987), regulations implementing the Wetlands Protection Act, G. L. c. 131, § 40. See Wilson v. Commonwealth, supra, Mass. App. Ct. at 758-760 (A.176).

due to the enforcement of environmental regulations which prohibit the plaintiffs from erecting stone seawalls, or revetments, on their property. Without the erection of these person-made structures, allege the plaintiffs, the natural erosion of the coastal beach and coastal dunes abutting their property will cause tremendous damage to the[ir] residences."

(A.166). The judge also noted that another Superior Court judge earlier had dismissed the plaintiffs' claims in this 1990 complaint under negligence and regulatory taking theories for failure to exhaust their administrative remedies (A. 166; see A. 177). ✓

Nothing in the terse and conclusory assertions in the plaintiffs' brief constitutes reasoned appellate argument raising any issue for our review. In any event, we affirm the dismissal of the plaintiffs' complaint in this action for the reasons stated in the Superior Court judge's decision (A.308) ✓⁵ and for the

✓ The present plaintiffs were not among those in Wilson v. Commonwealth, supra, and are on a different footing from those whose homes were destroyed in that case. Moreover, the present plaintiffs have not shown that they yet have been affected through any final administrative action by the defendants. See Nelson v. Commonwealth, 36 Mass. App. Ct. 1105 (unpublished memorandum and order at 2-4, February 28, 1994) (A.391-393), cert. denied, 115 S. Ct. 197 (1994).

✓ We particularly note the judge's conclusion that "the complaint is facially defective for failure to identify the parties in the body of the complaint so that the defendants can know the facts that are being alleged, by whom, and against whom." (A.308).

reasons given in the defendants' motion for summary disposition and application for damages at 6-18. In his dismissal of the complaint in this action, the judge concludes the plaintiffs seek to relitigate issues earlier decided. We agree. We also agree with the judge's conclusion that if any new issue may be read in the complaint, it is an allegation of discrimination under 42 U.S.C. §1983. The plaintiffs fail, however, as the judge concluded, to identify a violation of a constitutional right. Given the nature and pendency of the administrative proceedings, the plaintiffs can show no injury. Cf. Wilson v. Commonwealth, supra, 413 Mass. at 355-358.

Accordingly, we need not address the second ground advanced by the judge for his conclusion, that the plaintiffs, as non-residents, are not members of a suspect class historically subject to discrimination (A.309).

The plaintiffs' appeal in this case is made in the face of their acknowledgment that (1) their first action was dismissed in the Superior Court (A.324); (2) we affirmed that dismissal in our decision of February 28, 1994, Nelson v. Commonwealth, 36 Mass. App. Ct. 1105 (92-P-827) (A.390); (3) further appellate review was denied by the Supreme Judicial Court on April 26, 1994, in 417 Mass. 1106; and (4) their petition for

certiorari was denied by the United States Supreme Court on October 3, 1994, 115 S.Ct. 197. See plaintiffs' opposition to the defendants' motion for summary disposition and application for damages at 1-2.

In view of our prior decision, we deem the present appeal wholly insubstantial and frivolous. See generally, Avery v. Steele, 414 Mass. 450, 455 (1993). Accordingly, we grant the defendants' request for an award of just damages, costs and expenses of this appeal pursuant to Mass.R.A.P. 25, as amended, 378 Mass. 925 (1979). Cf. VMS Realty Inv., Ltd. v. Keezer, 34 Mass. App. Ct. 119 (1993). The defendants may submit a petition with supporting materials and details for such damages, costs, and expenses. See Yorke Mgmt. v. Castro, 406 Mass. 17, 20 (1989). The plaintiffs may have twenty calendar days from the date of filing to respond. See Whelihan v. Markowski, 37 Mass. App. Ct. 209, 215 (1994).

Judgment affirmed.

By the Court (Armstrong, Kass
& Jacobs, JJ.),


Clerk

Entered: October 4, 1995.