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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----x

YOEL WEISSHAUS,
Appellant,

v. Case: 11-4934-cv

PORT AUTHORITY OF NEW YORK AND
NEW JERSEY, et al.,
Appellee.

-----x
September 11, 2012
10:00 a.m.
U.S. Courthouse
500 Pearl Street

Before:
HON. BARRINGTON D. PARKER
HON. ROSEMARY S. POOLER
HON. RICHARD C. WESLEY

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APPEARANCES:

YOEL WEISSHAUS, appellant

516 River Road 6

New Milford, NJ 07646

BY: YOEL WEISSHAUS

THE PORT AUTHORITY OF NEW YORK

and NEW JERSEY, appellee

225 Park Avenue South

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BY: KATHLEEN GILL MILLER

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MR. WEISSHAUS: May it please the Court, my name is Yoel Weisshaus. I'm the appellant. I would like to reserve two minutes for rebuttal.

The **review** view on this appeal is that there is a colorable claim **that is** present. In this case, by increasing toll prices, the Port Authority did not provide conspicuous public knowledge of the board-held meetings or public hearings on increasing the tolls, besides newspaper notice, failed to outline in tabular form the price change and its impact on budget -- and budgetary impact.

The fact~~s~~ of the tolls are the tolls exceed the fair approximation of facilities by funding the World Trade Center and raising the Bayonne Bridge. Legislator approval is mandatory before designating toll revenues for new debt.

Second, we have here that the tolls exceed the benefit conferred. Since 2001, in less than 10 years, the

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tolls rose over 300 percent when inflation did not rise as high.

JUDGE WESLEY: Did they have a right, Mr. Weisshaus, to charge -- to include in their charge an amount of money for the replacement of capital over a period of time?

MR. WEISSHAUS: The thing is that it depends what -- what it is.

JUDGE WESLEY: Well, you would agree with me that the bridges and the tunnels operated by the Port Authority will need maintenance and/or --

MR. WEISSHAUS: Yes.

JUDGE WESLEY: -- replacement, some point?

MR. WEISSHAUS: Yes, yes. But --

JUDGE WESLEY: So it's not -- it's not just what their cost was.

MR. WEISSHAUS: Right.

JUDGE WESLEY: It's their -- so it's more than just their actual current cost. It's projected cost that they want to look at. Is that --

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MR. WEISSHAUS: The main thing of my focus in this case is the amount.

JUDGE WESLEY: Okay.

MR. WEISSHAUS: Okay?

When challenging the amount, I look at all factors. I look at what's involved in increasing the toll prices based on the facilities. If they're going to say, "Oh, we need money for this, we need money for that," well, I take a look at the Bayonne Bridge, it hasn't been painted in years but meanwhile, the toll has kept going up. For what has the toll been raised?

JUDGE POOLER: Are you arguing that the tolls are not reasonably related to the cost?

MR. WEISSHAUS: It's not consistent -- it's not consistent with what they charge.

In other words, they're saying that we need the money for this and this and this, and apparently, the prices are very high, but the cost for

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it didn't rise as much. So --

JUDGE WESLEY: Yeah, but -- I'm sorry. Go ahead and finish your answer. I apologize.

MR. WEISSHAUS: So what I'm trying to point out to this court is that there's a colorable claim present.

So if we go on the standards of review based on de novo or abuse of discretion or clear error, there -- there is a colorable claim present and the district court made an error to dismiss the complaint without giving an opportunity to amend the complaint, to amend the appropriate facts, and to cure the deficiencies from the complaint. So --

JUDGE WESLEY: I'm sorry. But the -- and really, your focus is not on the two prongs. It's not the -- not the dormant Congress clause because it doesn't discriminate against interstate commerce. Everybody pays the same toll.

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MR. WEISSHAUS: Not -- not --

JUDGE WESLEY: Let me ask you this: If in discovery -- say we agree with you and we send it back -- if in discovery, it's determined that no tolls are being used to fund the World Trade Center, does that then -- does your claim fail?

MR. WEISSHAUS: Not necessarily, because there's a \$2 penalty for -- for the payment of cash, which comes back to the point that it does discriminate the interstate commerce. For what reason is there a \$2 penalty of cash?

The Supreme Court has held in a variety of cases, the **penalty on** -- apparently the **violates interstate commerce** right to travel is -- is --

JUDGE WESLEY: That's a penalty that's imposed on anyone. You can get an E-Z Pass. You don't have to live in New York or New Jersey to get an E-Z Pass.

MR. WEISSHAUS: Well, the E-Z Pass is --

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JUDGE WESLEY: My E-Z Pass works in Massachusetts quite nicely.

MR. WEISSHAUS: Right. Well, I know E-Z Pass works nicely. But for people of the lower income like me, who cannot afford to have E-Z Pass and then at the month -- end of the month get a huge bill, for us to be subjected to a \$2 penalty for payment in cash, that's -- that's --

JUDGE WESLEY: Okay. So your answer is "no," that you still -- in your view, you'd still have a claim even if there's no money going to any -- anything with regard or -- with the regard to the World Trade Center?

MR. WEISSHAUS: Correct.

JUDGE WESLEY: Okay.

JUDGE POOLER: All right, Mr. Weisshaus. You reserved two minutes for rebuttal.

MR. WEISSHAUS: Thank you very much.

JUDGE WESLEY: Thank you.

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JUDGE POOLER: Thank you. And from the Port Authority.

MS. MILLER: May it please the Court, my name is Kathleen Miller. I'm an attorney for the Port Authority of New York and New Jersey and I would like to thank this court for allowing us to submit a brief in this case.

As you know, the Port Authority was never served with a summons and complaint in this action. Plaintiff chose to serve his summons and complaint on the press, and we learned about this action in the New York Post.

JUDGE POOLER: What's the status of the AAA case?

MS. MILLER: The status of the AAA case is that it's currently in discovery under the supervision of Judge Pitman. And there, it's --

JUDGE POOLER: They're making some of the same claims, aren't they?

MS. MILLER: The AAA case and the reason we are here is the AAA case made

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claims that the plaintiff never made.

The plaintiff in this case had a complaint which is clearly outlined in paragraph 6 that he was seeking injunctive relief and declaratory judgment to roll back these tolls because they discriminated against him, as he's claimed to be a poor person -- a poor person who, I might add, is able to afford his own court reporter.

But that was the gist of his complaint. He never made a claim under the Highway Act, 33 U.S.C. § 508, that the tolls are not just and reasonable within that context that -- excuse me, or the dormant Congress clause, which requires that there be a fair approximation of the benefits conferred. Those are not his arguments. He never mentioned the Congress clause. He never mentioned the Highway Act.

There were several references, conclusory allegations that the tolls

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were raised in connection with the World Trade Center. That was the extent of his claim, that they were not just and reasonable under either of those two statutes.

JUDGE POOLER: I think he's referred today within it and we're required, as you know, to read his complaint for any claim that they might raise, that they might conceivably be raised. Isn't that correct?

MS. MILLER: That's correct, Your Honor. But he didn't raise -- under Twombly, he didn't raise that claim, not even conceivably.

JUDGE WESLEY: Well, he just said that he thought that the money was being used for buildings at the World Trade Center. And as to whether that's true or not is a matter to be resolved fairly quickly after an appearance and a short amount of discovery.

MS. MILLER: That's a conclusory allegation. He has no facts to support

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that.

JUDGE WESLEY: How's he supposed to know that? I mean, I saw the governor's press release this morning. Apparently, tolls were being used to fund the museum. I mean, the -- did you see the governor's press release this morning?

MS. MILLER: I haven't seen the press release this morning, Your Honor. But one of --

JUDGE WESLEY: Well, New York Post --

MS. MILLER: If the AAA -- I'm sorry.

JUDGE WESLEY: No. So I mean, he made that allegation.

Look, we see insolvency things all the time and he made that allegation. There is the litigation, the AAA litigation, which is on this and there is a -- AAA's claims are that under solvent -- that, you know, the proportionate use, the fair approximate

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use, and the value received are out of the way.

MS. MILLER: AAA is very distinct. AAA has alleged facts in support of their complaint.

JUDGE WESLEY: Who had this case, Preska? Chief Judge Preska?

MS. MILLER: This was originally dismissed by --

JUDGE POOLER: Judge Batts.

JUDGE WESLEY: Judge Batts.

MS. MILLER: I'm sorry. I have the -- it was originally dismissed by Judge Batts and the decision was reviewed by Judge Preska under Rule 60 and she concurred --

JUDGE WESLEY: Okay.

MS. MILLER: -- that this complaint, even under the most liberal reading, failed to state a claim. But I would urge this court to consider that AAA has made the claim under the Highway Act and AAA has made the claim under the dormant Congress clause; and

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2 they more ably represent than plaintiff
3 would, the owners and drivers of motor
4 vehicles, and they're better qualified
5 to pursue that litigation, and there's
6 no -- it serves no purpose to have the
7 Southern District have two claims, one
8 of them coming in after the other,
9 following the other identically.

10 JUDGE WESLEY: Well, we certainly
11 could address, could we not, those
12 aspects of the claims that were raised?

13 If we disagreed, we could address
14 those aspects of the claims that --
15 sound and equal protection or right to
16 travel claims.

17 MS. MILLER: Well, the right to
18 travel claim here is basically that --
19 that comes down to driving a car.

20 JUDGE WESLEY: No. What I -- my
21 question was that -- my question was:
22 We certainly could address those
23 aspects of this complaint and decide
24 whether we would affirm the dismissal
25 of those, as opposed to the need for

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recreating, perhaps, a potential dormant Congress clause?

MS. MILLER: Yes, yes. I certainly -- I agree with that. And just to briefly address those: I think this Court, in Southold versus the Town of East Hampton, says that it's a non-discriminatory burden to be placed on travel through, you know, financial limitations on that travel, such as tolls. And the tolls here don't discriminate between people of different states. The toll is the same whether you're a New Jersey resident or a New York resident.

It's the crux of plaintiff's complaint here that it discriminates against him because he's poor, and that he can't afford to pay the toll. And the relief that he sought in his complaint was to set aside the tolls for that reason and to be relieved of his indebtedness for not having paid the toll when he drove across the

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bridge and, therefore, have been billed for them.

But, basically, there are other courts, and I think the Monarch decision out of the Ninth Circuit, this Court's decision in the Town of Southold, strongly suggest there's no constitutional right to drive a car. And that's really the crux of plaintiff's complaint, that he wants to be able to drive his car, as opposed to taking the Path train. There are other means of transportation available to him.

But the Sixth Circuit, the Ninth Circuit, and I think to a large extent, this circuit in the Town of Southold case, have held that there isn't a constitutional right of an individual to have a particular mode of transportation or to be free from any burden that the state may wish to place upon it.

And the other part of the --

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2 plaintiff's complaint was the
3 Robinson-Patman claim, which was
4 correctly dismissed by Judge Batts.
5 That would reflect a commodity, but I
6 don't know of any case that's held that
7 paying tolls -- that using a road is a
8 commodity. And also, there's no
9 evidence of discriminatory pricing.

10 The price -- the discounts for
11 E-Z Pass are the same, and I might add,
12 plaintiff did not raise an E-Z Pass
13 complaint claim below any more than he
14 raised the just and reasonable Highway
15 Act claim below.

16 These are claims the plaintiff
17 has raised for the first time on
18 appeal.

19 And, finally, he seeks to have
20 some sort of staked claim for unjust
21 enrichment, which Judge Batts did not
22 address. But I don't think she needs
23 to if she finds there's no
24 constitutional violation or any
25 violation of the Robinson-Patman Act,

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she doesn't need to address the staked claim. That falls on its own.

Thank you very much. No further questions.

JUDGE POOLER: Mr. Weisshaus, you reserved two minutes for rebuttal.

MR. WEISSHAUS: Thank you. Of the 88 paragraphs in the complaint, there's not a single mention of the word "drive." This -- there's nothing in the complaint that implies we are talking here about a right-to-drive claim. What I'm talking here is about the right to travel.

And the important part is -- between AAA and the World Trade Center and a number of cases, and it's common law in the legal community, a cause of action is based upon the facts; whatever the facts are, that's what creates the cause of action. Then you can utilize certain laws, certain statutes in order to -- to advance the **cause of** -- the call for action.

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2 In this case, the fact that the
3 -- that I allege in the complaint that
4 the tolls are being used for the World
5 Trade Center and, the same thing, it
6 was acknowledged by the District Court,
7 that AAA alleged, is indistinguishable;
8 they're two of the same facts. Whether
9 I choose to use this particular statute
10 or this particular statute, it's
11 irrelevant because there's a number of
12 statutes within the Port Authority
13 **compact** contract that prohibits using the money
14 **outside** for anything out of the legislator
15 authorization.

16 The priority of assessing a sua
17 sponte dismissal prior to the service
18 of a defendant **is if there is a colorable claim** -- because this is what
19 happened here. The District Court,
20 before they -- they dismiss -- they
21 grant or deny, apprise the application,
22 they review it; and then if they grant
23 it, they may issue a summons or may
24 dismiss it.

25 The point is if there is a

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colorable claim, then the District Court has to provide at least one opportunity to amend the complaint to cure the deficiency.

In this case, the District Court did not rule out any ability that amending the complaint would not cure the deficiencies. The fact that AAA was able to advance a similar claim was indistinguishable. In fact, whether -- the statute is not important for them to follow. The point here is that the facts are colorable.

And this is where I stand at. Whether we assume this case under de novo or abuse of discretion or of clear error, there's -- the holdings of this case, for example, in three separate 2012 decrees, this Court upheld in Gardner and Roberts and Hathaway that the District Court has to provide an opportunity, at least once, for a proprius to amend a complaint before dismissing it.

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With that, I conclude. Thank you
very much.

(Record closed)