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United States District Court,
S.D. California.

Floyd L. MORROW, Marlene Morrow, Plaintiffs,
v.
CITY OF SAN DIEGO, Defendant.

Case No. 11-cv-01497-BAS-KSC
|
Signed 07/21/2017

Attorneys and Law Firms

Malinda Dickenson, Law Office of Malinda R. Dickenson, San Diego, CA, for Plaintiffs.

Carmen A. Brock, Jenny Goodman, Michael Travis Phelps, Office of the City Attorney, San Diego, CA, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

[ECF No. 149]

Hon. Cynthia Bashant, United States District Judge

***1** Defendant the City of San Diego ("the City") files this Motion for Summary Judgment ("MSJ") arguing that no evidence exists to support Plaintiffs Floyd and Marlene Morrows' theory that they were subject to disparate treatment in violation of the Equal Protection Clause of the U.S. Constitution. (ECF No. 149.) The Morrows oppose. (ECF No. 152.) The Court finds this motion suitable for determination on the papers submitted and without oral argument. *See* Fed. R. Civ. P. 78(b); Civ. L.R. 7.1(d)(1). For the reasons stated below, the Court **GRANTS** the MSJ and directs that judgment be entered in favor of the City and against the Morrows.

I. PROCEDURAL HISTORY

The procedural history of this case is a tortured one. Suffice it to say, the Court invoked *Pullman* abstention pending completion of state court proceedings. (ECF No. 61.) On August 2, 2016, the Court found that abstention was no longer appropriate and that the sole remaining claim was the second cause of action in the Fourth Amended Complaint ("4AC") alleging a violation of 42 U.S.C. § 1983 pursuant to the Equal Protection clause of the U.S. Constitution. (ECF No. 132.)

Count Two of the 4AC alleges that on November 5, 2009, a Memorandum of Understanding ("MOU") was reached between the Economic Development Division's Community Development Block Grant Program ("CDBG") and the Neighborhood Code Compliance Department ("NCCD") of the City of San Diego. (4AC ¶ 29, ECF No. 47.) "[T]he City purports to be authorized and empowered [by this MOU] to 'target blight in certain areas' of the City including City Heights and other low to moderate income areas, by seeking out and prosecuting property owners and residents in those certain areas." (*Id.*) The Morrows allege that the City only prosecutes residents in low to moderate income neighborhoods pursuant to the City's "CDBG Proactive Code Enforcement Project." (*Id.* ¶ 89.)

On June 5, 2017, the Court denied the Morrows' Motion for Class Certification. (ECF No. 147.) Hence the only remaining claim is the Morrows' individual claim for a violation of the Equal Protection Clause.

II. STATEMENT OF FACTS[1]

A. The Morrows' Citation

The Morrows own a duplex and a vacant lot in the City Heights area of San Diego. (MSJ Exs. A, B, ECF Nos. 149-4, 149-5.) On August 1, 2007, Michael Richmond, a City Zoning Investigator for grading violations and environmentally sensitive lands in San Diego at the time, noticed a grading violation on Plaintiffs' vacant lot. (Declaration of Michael Richmond ("Richmond Decl.") ¶ 2, MSJ Ex. C, ECF No. 149-5.) He took photographs of what he perceived to be illegal grading. (*Id.* ¶ 6, Exs. A, B.)[2] He then referred the grading violations he observed to the City's NCCD for further investigation and enforcement.[3]

***2** Because of heavy case loads, a zoning investigator was not assigned to this reported violation until January 2009. (Richmond Decl. ¶¶ 10-2, 11-2.) At this time, NCCD Officer Eric Picou took over the investigation and went to see if the code violations still existed on the Morrows' property. (MSJ Ex. I at 14:12-15:13.) For the next six months, Officer Picou tried to obtain permission from the Morrows to inspect the property, but they denied him access. (*Id.* at 16:5-21:18.) Finally, on June 3 and 4, 2010, the NCCD issued two Civil Penalty Notices, one for the duplex and one for the vacant lot, for violations that could be observed from the public right of way. (MSJ Exs. D, E.)

B. The November 5, 2009, MOU

On November 5, 2009, the CDBG and the NCCD of the City of San Diego entered into an MOU "specifically targeted to arrest the decline of deteriorating neighborhoods." (Statement of Work, MOU Attachment 1, Vacchi Dep. Ex. 12, ECF No. 152-2 at 119-125.) The neighborhoods selected for proactive enforcement "have a high incidence of substandard housing, illegal garage conversions, illegal dwelling units, illegal storage violations and vacant properties." (*Id.* § I.) Furthermore, "[e]ach of the census tracts chosen for the Project area is developed with a high number of rental units occupied by low-income and moderate income residents." (*Id.* § II.) "The areas have a higher than normal number of code enforcement cases, a higher than normal frequency of visual blight, and a greater potential for substandard housing conditions." (*Id.*) Because the areas are heavily occupied by rental units, they receive fewer complaints than do areas that are primarily owner-occupied, and thus they "do no generate enough complaints for reactive code enforcement alone to stem the tide of deterioration." (*Id.*) "The Project is primarily intended to assist neighborhood residents and/or property owners in removing slum and blight conditions on a spot basis, eliminate substandard housing conditions and improve the livability and vitality of the identified deteriorating neighborhoods." (*Id.*)

According to the uncontradicted statement of Mr. Richmond, who is now the Deputy Director for the Code Enforcement Division for the City of San Diego, "[i]dentification of grading violations in 2009 were not, and never have been, considered part of this 'proactive code enforcement' program." (Richmond Decl. ¶ 10.) This is true regardless of whether the grading violation was or was not in an area that was eventually funded by CDBG revenue for "proactive" enforcement. (*Id.* ¶ 11.) Furthermore, Mr. Richmond states, "[a]t no time during my employment as a Zoning Investigator and grading expert was my position considered a 'proactive' code enforcement position, ... [n]or was any of the work I performed ever funded by CDBG funds as part of a 'proactive' code enforcement program." (*Id.* ¶ 13.)

III. LEGAL STANDARD

Summary judgment is appropriate under Rule 56(c) where the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

A party seeking summary judgment always bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The moving party can satisfy this burden in two ways: (1) by presenting evidence that negates an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *Id.* at 322-23. "Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

***3** "[T]he district court may limit its review to the documents submitted for the purposes of summary judgment and those parts of the record specifically referenced therein." *Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1030 (9th Cir. 2001). The court is not obligated "to scour the record in search of a genuine issue of triable fact." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (citing *Richards v. Combined Ins. Co. of Am.*, 55 F.3d 247, 251 (7th Cir. 1995)).

If the moving party fails to discharge this initial burden, summary judgment must be denied, and the court need not consider the nonmoving party's evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970). If the moving party meets this initial burden, however, the nonmoving party cannot defeat summary judgment merely by

demonstrating "that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986); *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995) ("The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient." (citing *Anderson*, 477 U.S. at 242, 252)). Rather, the nonmoving party must "go beyond the pleadings" and by "the depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)).

When making this determination, the court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. *See Matsushita*, 475 U.S. at 587. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, [when] he [or she] is ruling on a motion for summary judgment." *Anderson*, 477 U.S. at 255.

IV. ANALYSIS

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleborne, Tex. v. Cleborne Living Ctr.*, 473 U.S. 432, 439 (1985). However, "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Thus, "[u]nless a classification trammels fundamental personal rights or implicates a suspect classification, to meet constitutional challenge the law in question needs only some rational relation to a legitimate state interest." *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990); *see also Cleborne*, 473 U.S. at 440 ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.")

To succeed on a selective enforcement claim under the Equal Protection Clause of the Fourteenth Amendment, "a plaintiff must demonstrate that enforcement had a discriminatory effect and [that those enforcing the statute] were motivated by a discriminatory purpose." *Lacey v. Maricopa Cty.*, 693 F.3d 896, 920 (9th Cir. 2012) (internal quotation marks omitted). "Discriminatory effect" requires a showing that others similarly situated, who could have been prosecuted, were not. *Id.* The plaintiff must "identify a similarly situated class against which the plaintiff's class can be compared." *Freeman v. Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995) (internal quotation marks omitted). "Discriminatory purpose" requires that the plaintiff show the defendant decided to enforce the law against the plaintiff "on the basis of an impermissible ground such as race, religion or exercise of ... constitutional rights." *Lacey*, 693 F.3d at 922 (internal quotation marks omitted).

***4** In this case, the Morrows allege that the MOU signed on November 5, 2009, between the CDBG and NCCD of the City of San Diego specifically targets residents in low to moderate income areas. Thus, the Morrows claim they were targeted for code violations because they lived in a low to moderate income area. Although the zoning laws applied equally to all residents in San Diego, the Morrows allege the laws were selectively enforced proactively against them based on their residence in one of these lower income areas. (4AC ¶¶ 29, 89.)

The Morrows' equal protection claim fails for three reasons. First, the Morrows fail to show that they were treated any differently than other individuals similarly situated. Second, the Morrow fail to show that the complained of proactive enforcement was not supported by a rational basis. Finally, the Morrows fail to show that the enforcement was based on any discriminatory purpose. The Court discusses each of these failures in turn.

A. Lack of Disparate Treatment

Although the Morrows claim they were targeted for enforcement under the November 5, 2009, MOU, the uncontradicted evidence is to the contrary. According to Mr. Richmond's uncontradicted declaration, the Morrows were targeted when he noticed a grading violation on their vacant lot on August 1, 2007, well before the MOU was signed. (Richmond Dec. ¶¶ 2, 6, 10-2.) Although the actual citations were not issued until after the MOU was signed, the genesis of the investigation was not the proactive enforcement targeted in the MOU. Thus, the Morrows cannot claim they were denied equal protection by enforcement of the MOU.

And, even if they were targeted by the MOU, there is no evidence that others similarly situated were not given

similar citations. The Morrows do not claim that those in richer neighborhoods did not receive such citations. They complain only that the way the zoning violations came to the attention of the City—either via proactive enforcement by City employees or via reactive enforcement because of neighborhood complaints—was discriminatory. Because the Morrows fail to show that others similarly situated did not receive zoning violations for similar conduct, they fail to show disparate treatment sufficient to make an equal protection claim. *Cf. Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (concluding that the plaintiff had established different treatment because she showed that the defendant "demanded a 33-foot easement as a condition of connecting her property to the municipal water supply" but "required only a 15-foot easement from other similarly situated property owners").

B. Rational Basis

As a preliminary matter, ordinary zoning ordinances, such as the one at issue in this case, do not implicate a "fundamental right," nor is the alleged classification based on low or moderate income neighborhoods a "suspect classification." *See Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 132 S. Ct. 2073, 2080 (2012) (reasoning where a city's classification's "subject matter is local, economic, social, and commercial," it does not implicate a "fundamental right"); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 23–25 (1973) (concluding discrimination against the "poor" was not subject to strict scrutiny where there was no evidence that individuals below the poverty threshold were subject to an absolute deprivation of a desired benefit). The Morrows appear to argue in their Opposition that the proactive enforcement of the zoning ordinance implicated a fundamental right of freedom of speech, access to the courts, right to be left alone in one's home, right of petition, and warrantless trespass on public property. The Court disagrees. There is no evidence to support the Morrows' claim that they were targeted for any of these alleged reasons. Fundamentally, this case is about targeting certain neighborhoods for stronger zoning enforcement. This targeting neither implicates a fundamental right nor involves a suspect classification. Thus, the proactive enforcement program will be upheld if it has a rational relationship to a legitimate state interest.

***5** The state interest, as stated in the MOU, is to "improve the livability and vitality of [certain] identified deteriorating neighborhoods." The proactive enforcement program targets neighborhoods that have a higher incidence of zoning violations and a lower incidence of zoning complaints because of the high number of rental units in the areas. The program targeting these areas for increased enforcement has a rational relationship to the state's interest in maintaining these deteriorating neighborhoods. Hence, the Morrows' equal protection claim must fail.

C. Selective Enforcement

To the extent the Morrows are claiming that the zoning ordinances were selectively enforced against them, the Morrows—aside from failing to show that others similarly situated were not prosecuted as discussed above—also fail to present any evidence of a "discriminatory purpose." Instead, the Morrows respond with a barrage of alleged violations, some constitutional, some not, including, among others: freedom of speech, freedom to associate, bill of attainder, freedom of thought, the Supremacy Clause, the law of search and seizure, limiting access to the courts, freedom to be left alone in one's home, trade libel per se, defamation, and patent law. The Morrows provide no evidentiary support for any of these far-reaching and difficult to understand claims. Because they fail to provide any evidence of a "discriminatory purpose," any claim for selective enforcement must fail.

V. CONCLUSION

In light of the foregoing, the City's Motion for Summary Judgment is **GRANTED**. (ECF No. 149.) The Clerk of the Court is directed to enter judgment in favor of the City and against the Morrows. The case is closed.

IT IS SO ORDERED.

All Citations

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Footnotes

1 The City requests that the Court take judicial notice of various grant deeds recorded in the County of San Diego, orders issued by the San Diego Superior Court, and sections from the City of San Diego City Charter and the San Diego Municipal Code. (ECF No. 149-3.) The Morrows do not oppose. The Court grants the Request for Judicial Notice. *See* Fed. R. Evid. 201; *see also, e.g.*, *United States v. Corinthian Colls.*, 655 F.3d 984, 999 (9th Cir. 2011) (providing the court may take judicial notice of matters of public record that are not subject to reasonable dispute).

2 The Court overrules the Morrows' objections to these photographs as lacking foundation and authentication (ECF No. 152-5.) Mr. Richmond's Declaration both lays the foundation and authenticates the photos. The Court similarly overrules the Morrows' objections to photographs shown to Mr. Morrow during his deposition. They are admitted solely for the purpose of giving meaning to the answers Mr. Morrow provides in his deposition when these photographs are shown to him.

3 The paragraphs in Mr. Richmond's Declaration appear to be misnumbered, resulting in paragraphs with duplicate numbers of 10, 11, and 12. The Court references the second set of paragraphs with duplicate numbers as 10-2, 11-2, and 12-2.