IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

BISON CONTRACTING CO., INC., *Plaintiff/Appellant*,

v.

JOHN and RUTH HALIKOWSKI, husband and wife; JENNIFER and GREG TOTH, husband and wife; DALLAS and BRITA HAMMIT, husband and wife, *Defendants/Appellees*.

No. 1 CA-CV 12-0851
FILED 12-19-2013

Appeal from the Superior Court in Maricopa County
No. CV2012-052629
The Honorable Alfred M. Fenzel, Judge

AFFIRMED

COUNSEL

Carmichael & Powell, P.C., Phoenix
By David J. Sandoval

Counsel for Plaintiff/Appellant

Arizona Attorney General's Office, Phoenix
By Mark P. Bookholder

Counsel for Defendants/Appellees

MEMORANDUM DECISION

Presiding Judge Maurice Portley delivered the decision of the Court, in which Judge John C. Gemmill and Judge Kent E. Cattani joined.

P O R T L E Y, Judge:

¶1 Bison Contracting Co., Inc. ("Bison") appeals an order dismissing its complaint against three state officials, John Halikowski, the Director of the Arizona Department of Transportation ("ADOT"), Jennifer Toth, the State Engineer, and Dallas Hammit, the Deputy State Engineer, (collectively, "Individual Defendants"), for failure to state a claim upon which relief may be granted. For the reasons that follow, we affirm.

FACTUAL[1] AND PROCEDURAL HISTORY

¶2 Bison, a public-works contractor, was awarded an ADOT contract to work on a highway construction project known as the Granite Creek Project. By May 11, 2012, Bison was two years behind schedule; it had encountered delays that increased its costs, such as an ineffective dewatering plan, access road issues, and unforeseeable changes in subterranean conditions. As a result, Bison submitted a claim to ADOT for more compensation. ADOT, however, rejected the claim and Bison continued work.

¶3 ADOT subsequently offered to settle Bison's complaints twice, but Bison rejected the settlement offers and project deadline extension. ADOT then began withholding liquidated damages and other sums, including revenue due to Bison from other projects. Additionally, ADOT allegedly started holding Bison to "abnormally rigid standards in the field," began enforcing discretionary contract provisions without notice at several of Bison's projects, and subjected Bison to increased monitoring. Because Bison thought it was held to more rigid standards "than other contractors who have completed similar jobs in the surrounding area," it sued ADOT and the three officials in May 2012.

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[1] We accept the complaint's factual allegations as true to review a motion to dismiss decision. *Coleman v. City of Mesa*, 230 Ariz. 352, 361, ¶ 36, 284 P.3d 863, 872 (2012).

¶4 Bison alleged that "ADOT's policies and practices towards Bison Contracting, after it rejected ADOT's settlement offer, were calculated to cause Bison Contracting financial ruin and to prevent Bison Contracting from bidding or being awarded future ADOT work." Bison further alleged that the Individual Defendants were grossly negligent and deliberately indifferent to Bison's rights and that Bison "has been deprived of its Fourteenth Amendment right to enjoy equal protection under the law and to preserve its liberty to conduct business activities free from undue State oppression."

¶5 After the Individual Defendants filed their motion to dismiss, the superior court subsequently dismissed the § 1983 claims against the officials "for the multiple bases . . . stated by the Individual State Defendants." The record reflects five reasons for the court's action. First, the § 1983 claim failed because the complaint was devoid of factual allegations to state or support the claim. Second, Bison did not plead facts that demonstrated a liberty interest or that the liberty interest had been violated. Third, although it does not appear that Bison alleged a procedural due process violation, even if it did, it fails. Fourth, the equal protection argument fails because the complaint does not provide enough detail regarding disparate treatment and discriminatory intent. Finally, qualified immunity otherwise bars Bison's claim against the state officials.

DISCUSSION

¶6 Bison argues that the superior court wrongfully found that it could not prove any set of facts to support its claim against the Individual Defendants.

Standard of Review

¶7 We independently review the dismissal of a complaint for failure to state a claim upon which relief may be granted. *Coleman*, 230 Ariz. at 355, ¶ 7, 284 P.3d at 866 (stating that the review is de novo); *Phelps Dodge Corp. v. El Paso Corp.*, 213 Ariz. 400, 402, ¶ 8, 142 P.3d 708, 710 (App. 2006). We will affirm if the plaintiff would not be entitled to relief, even if the plaintiff were to prove all alleged facts as true. *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 391, ¶ 18, 121 P.3d 1256, 1261 (App. 2005). We are limited to considering well-plead facts and reasonable interpretations from the facts; we cannot speculate about hypothetical facts that could give plaintiff relief. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 420, ¶ 14, 189 P.3d 344, 347 (2008). We decline to resolve disputed factual issues and instead consider whether a claim is sufficiently stated to let the plaintiff

prove its case. *Coleman*, 230 Ariz. at 363, ¶ 46, 284 P.3d at 874. We can affirm a trial court's grant of a motion to dismiss for any reason the record supports. *See Dube v. Likins*, 216 Ariz. 406, 417 n.3, ¶ 36, 167 P.3d 93, 104 n.3 (App. 2007).

¶8 In addressing § 1983 claims in state court, federal law controls the substantive claim, while state law governs procedure. *Baker v. Rolnick*, 210 Ariz. 321, 325, ¶ 18, 110 P.3d 1284, 1287 (App. 2005); *see Shotwell v. Donahoe*, 207 Ariz. 287, 290, ¶ 6, 85 P.3d 1045, 1048 (2004) ("While federal laws generally control substantive aspects of federal claims adjudicated in state courts, state rules of procedure and evidence apply unless the state rules would affect the substantive federal right."). To interpret federal substantive law, we first look to United States Supreme Court decisions, which bind state courts on substantive federal issues; we may also look to the Ninth Circuit and other circuit courts as persuasive authority. *See Weatherford ex rel. Michael L. v. State*, 206 Ariz. 529, 533, ¶ 12, 81 P.3d 320, 324 (2003).

I. Class-of-One Equal Protection Claim

¶9 Bison's claim against the Individual Defendants is an equal protection claim, better known as a class-of-one equal protection claim. "The equal protection clause . . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to [treatment] not imposed on others of the same class." *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n of Webster Cnty., W. Va.*, 488 U.S. 336, 345 (1989) (quoting *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946)). A plaintiff in a class-of-one equal protection claim does "not allege membership in a class or group" but rather must allege in its complaint: that a defendant intentionally; treated plaintiff differently than others similarly situated; without a rational basis. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

¶10 A plaintiff must also allege a specific injury and how it arises from a defendant's conduct. *Rizzo v. Goode*, 423 U.S. 362, 371-73 (1976); *King v. Atiyeh*, 814 F.2d 565, 568 (9th Cir. 1987), *overruled on other grounds by sub. nom. Lacey v. Maricopa Cnty.*, 693 F.3d 896 (9th Cir. 2012). A plaintiff must show personal participation by the state individuals and not just that a person has the right to control; there must be an allegation that control was exercised. *Tripati v. State Dep't of Corr.*, 199 Ariz. 222, 226, ¶ 11, 16 P.3d 783, 787 (App. 2000) (noting that supervisor status alone will not support § 1983 liability). Finally, the plaintiff must allege that the defendant acted under the color of state law, meaning that the defendant

acted with power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Polk Cnty. v. Dodson*, 454 U.S. 312, 317-18 (1981) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

¶11 The United States Supreme Court has held that class-of-one claims do not exist in the public-employment context because of the discretionary decision-making afforded to state employers. *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598, 602-05 (2008) (noting that employment situations lack a clear standard against which departures from the norm for a single plaintiff can be assessed). The Eleventh Circuit has interpreted *Engquist* to prohibit class-of-one equal protection claims in the government-contractor context. *Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269, 1274 (11th Cir. 2008). There, the court stated that "[j]ust as in the employee context . . . decisions involving government contractors require broad discretion that may rest on a wide array of factors that are difficult to articulate and quantify." *Id.* (internal quotation marks omitted); *see Heusser v. Hale*, 777 F. Supp. 2d 366, 384 n.31 (D. Conn. 2011) ("The Court notes that even if the Plaintiffs were characterized as 'government contractors,' rather than 'public employees,' *Engquist* would still apply to bar their claims.") (citing *Douglas Asphalt Co.*, 541 F.3d at 1274); *E. Amherst Plumbing, Inc. v. Thompson*, 12-CV-0195A, 2013 WL 5442263, at *5 (W.D. N.Y. Sept. 27, 2013) (finding class-of-one equal protection claims barred in the government construction contract arena when the government acted with discretion).

¶12 We need not determine whether we should, like the Eleventh Circuit in *Douglas Asphalt Co.*, expand *Engquist* to the public contractor context, because Bison's class-of-one claim fails for an independent reason as outlined below. *See SECSYS, LLC v. Vigil*, 666 F.3d 678, 690 (10th Cir. 2012) ("[W]hether *Engquist* reaches [to exclude class-of-one claims in the government-contractor context is something] we need not decide today because even if class of one doctrine applies fully and vigorously in the government contracting world, SECSYS's claim falls of its own weight.").

II. Sufficiency of the Complaint

¶13 Assuming without deciding that a class-of-one claim exists in the government contractor context, Bison's complaint fails because it does not plead facts with specificity to state a claim. *See* Ariz. R. Civ. P. 8(a) ("A pleading which sets forth a claim for relief . . . shall contain . . . [a] short and plain statement of the claim showing that the pleader is entitled

to relief."). The complaint's conclusory statements do not establish a basis for relief, *Cullen*, 218 Ariz. at 419, ¶ 7, 189 P.3d at 346, and we decline to accept as true allegations that are merely legal conclusions or inferences from poorly pled facts. *Jeter*, 211 Ariz. at 389, ¶ 4, 121 P.3d at 1259.

A. Intentionally Discriminatory

¶14 The first of the three elements that must be alleged in a § 1983 class-of-one equal protection claim is that the official's conduct was intentionally discriminatory. *Gerhart v. Lake Cnty., Mont.*, 637 F.3d 1013, 1022 (9th Cir. 2011). A mere allegation of disparate impact is insufficient; there must also be factual allegations that the defendant was purposefully involved with a discriminatory intent. *See Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998).

¶15 The complaint states: "[b]y designing, authorizing, or implementing such policies and practices directed at Bison Contracting, under the color of Arizona State law, Defendants Halikowski, Toth, and Hammit were grossly negligent and exercised a deliberate indifference to Bison Contracting's Fourteenth Amendment rights." The complaint also alleges and incorporates into the class-of-one claim, that each of the three state officials "individually and with a community purpose, designed, authorized, or implemented policies and practices directed at Bison Contracting, under the color of Arizona state law, which are the subject of this litigation, such that this Court has jurisdiction . . . ."

¶16 Mindful of Arizona's notice pleading standard, *Cullen*, 218 Ariz. at 419, ¶ 6, 189 P.3d at 346, and considering the "deliberate indifference" language used in the complaint, we need not attempt to decide whether that language adequately alleged that each of the three state officials acted with intentional purpose to discriminate against Bison. Although the complaint could have followed the requirement for the first element of a class-of-one equal protection claim, we think there are deficiencies with the other elements of the § 1983 claim that preclude the claim.

B. Other Similarly Situated Contractors and Unique Treatment

¶17 The second element of a class-of-one equal protection claim requires that it be pled and proved that a plaintiff was treated differently than similarly situated entities. *Olech*, 528 U.S. at 564. To "be considered similarly situated," the others "must be *prima facie* identical in all relevant respects or directly comparable to plaintiff in all material respects." *Racine*

Charter One, Inc. v. Racine Unified Sch. Dist., 424 F.3d 677, 680 (7th Cir. 2005) (internal quotation marks and citation omitted). In one case, a complaint failed in part to establish a class-of-one claim because the plaintiff did not allege that it was treated differently than similarly situated parties; the plaintiff police officer, who had been terminated for misconduct, was not similarly situated to officers retiring with untarnished records. *Stachowski v. Town of Cicero*, 425 F.3d 1075, 1078-79 (7th Cir. 2005) (stating that "[the officer had] not alleged that he was treated differently than other officers who were awarded retirement benefits after suspension and then termination for misconduct"). Bison alleges that ADOT treated it differently from other similarly situated contractors by pleading: "[u]pon information and belief, Bison Contracting has been held to more rigid standards at the Granite Creek Project than other contractors who have completed similar jobs in the surrounding area." The allegation is conclusory and fails to adequately identify other similarly situated contractors, whether by the precise location of the allegedly similar jobs, the names of the allegedly similar contractors, or that those contractors' contracts are sufficiently similar to the contract between ADOT and Bison. Moreover, Bison compares itself to contractors who have completed jobs, as opposed to those, like Bison, who had missed agreed upon deadlines and had yet to finish their projects.

¶18 Bison argues in its reply brief that there are two bridges similar in size, scope, and location to the Granite Creek Bridge that were under construction during the time Bison was working on the Granite Creek Project, but the identity of the contractors is unknown because discovery was not allowed. Bison further contends that a simple inspection of the two bridges shows that the aesthetic requirements sought in the Granite Creek Project was not required on the other two projects. Bison states that:

> [it] knows most of the contractors who bid and perform similar work for ADOT. It is unaware of any other contractor who suffered the same type of scrutiny and heightened standards that were imposed upon Bison Contracting after it rejected ADOT's settlement offer relating to the overruns at Granite Creek.

¶19 The Bison complaint failed to mention the two other bridges even if it did not know the names of the contractors or whether the contracts may have been similar. Because the complaint only contains the

conclusory statement that Bison was treated differently from other similarly situated contractors, the second element of the § 1983 claim was insufficiently pled and supports the court's ruling.

C. Lack of a Rational Basis

¶20 The final factor to be alleged in a class-of-one equal protection claim is that a state official did not have a rational, legitimate government purpose, to treat the plaintiff differently than the other similarly situated persons. *See Gerhart*, 637 F.3d at 1023 (noting that it was reasonable for Congress to treat an oil tanker that spilled eleven million gallons of oil differently from other oil tankers) (citing *SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662 (9th Cir. 2002))).

¶21 Here, the complaint does not allege that the Individual Defendants did not have a rational basis for their treatment of Bison. Bison recognizes its pleading failure, but argues that "[i]t can easily be inferred from the allegations of the Complaint that Bison Contracting believes there to be no rational basis for the disparate treatment it received at the hands of the Individual Defendants."

¶22 An element that has to be pled cannot be inferred from poorly pled facts. *See Grand v. Nacchio*, 222 Ariz. 498, 506, ¶¶ 28-29, 217 P.3d 1203, 1211 (App. 2009) (dismissing a complaint for failing to allege each element); *see also Jeter*, 211 Ariz. at 389, ¶ 4, 121 P.3d at 1259 ("[W]e do not accept as true allegations consisting of conclusions of law, inferences or deductions that are not necessarily implied by well-pleaded facts, . . . or legal conclusions alleged as facts."). Moreover, Bison's admission in the complaint that the Granite Creek Project is nearly two years behind schedule and remains incomplete, suggests that state officials had a rational, legitimate government purpose to increase the monitoring of Bison. Given that the Plaintiff did not sufficiently plead that there was no rational basis for the alleged disparate treatment, the § 1983 claim fails.

III. Leave to Amend

¶23 Bison also argues that the court erred by denying its request to amend the complaint. We review the denial of a request to amend a complaint for an abuse of discretion. *Bishop v. State Dep't of Corr.*, 172 Ariz. 472, 474, 837 P.2d 1207, 1209 (App. 1992). Once the opportunity to amend the pleading as a matter of course has passed, the party can amend "by leave of court or by written consent of the adverse party." Ariz. R.

Civ. P. 15(a) ("Leave to amend shall be freely given when justice requires."). The court, in its discretion, may grant amendments unless it finds "undue delay in the request, bad faith, undue prejudice, or futility in the amendment." *MacCollum v. Perkinson*, 185 Ariz. 179, 185, 913 P.2d 1097, 1103 (App. 1996), *corrected* Mar. 13, 1996. A trial court must give the non-moving party a chance to make non-futile amendments to the complaint before granting a Rule 12(b)(6) motion to dismiss. *Wigglesworth v. Mauldin*, 195 Ariz. 432, 439, ¶ 26, 990 P.2d 26, 33 (App. 1999). But a request for leave to amend must be made in a proper motion. *Blumenthal v. Teets*, 155 Ariz. 123, 131, 745 P.2d 181, 189 (App. 1987) (noting that the court did not err by denying plaintiff the opportunity to amend its complaint when plaintiff requested leave to amend in its response to appellee's motion to dismiss instead of in a procedurally proper motion).

¶24 Here, Bison failed to amend its pleadings as a matter of course and failed to file a motion to request leave of court to do so. Bison stated in its response to Defendants' motion to dismiss, "[t]o the extent this Court disagrees [that Bison has pled sufficient facts], Bison requests leave to amend the Complaint to add additional facts supporting its claim against the Individual Defendants." Arizona Rule of Civil Procedure 7.1(a) requires that: "[a]n application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Moreover, a copy of the amended pleading must be attached to the motion. Ariz. R. Civ. P. 15(a)(2). Bison's one-sentence request for leave to amend embedded in a response to a motion to dismiss, like in *Blumenthal*, is "not a motion and is not pleaded with particularity as required by Rule 7." *Blumenthal*, 155 Ariz. at 131, 745 P.2d at 189. Consequently, the trial court did not abuse its discretion by failing to let Bison amend its complaint.

IV. Qualified Immunity

¶25 In addition to their Rule 12(b)(6) argument, the Individual Defendants also argue that they were properly dismissed because they have qualified immunity. Qualified immunity to a § 1983 claim is a question of federal law. *State v. Superior Court*, 185 Ariz. 47, 49, 912 P.2d 51, 53 (App. 1996).

¶26 Qualified immunity protects a government official from civil liability if his or her conduct does not violate an established constitutional or statutory right which a reasonable person would have known. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009); *Weatherford ex rel. Michael L.*, 206 Ariz.

at 531-32, 81 P.3d at 322-23. As a result, a court must consider in either order: (1) whether the plaintiff has alleged facts that constitute a constitutional right violation, or (2) whether the right was clearly established when the defendant allegedly misbehaved. *Pearson*, 555 U.S. at 232, 236.

¶27 We need not address whether the superior court properly dismissed Bison's complaint on qualified immunity grounds because we affirm the dismissal based on the complaint being insufficiently pled. *See Dube*, 216 Ariz. at 417 n.3, ¶ 36, 167 P.3d at 104 n.3 ("[W]e may affirm the trial court if it is correct for any reason.").

CONCLUSION

¶28 Based on the foregoing, we affirm the order dismissing Bison's complaint against the Individual Defendants.

Ruth A. Willingham · Clerk of the Court
FILED: mjt