FILED
United States Court of Appeals
Tenth Circuit

September 14, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BAYARDO RENO SANDY,

Plaintiff - Appellant,

v.

THE BACA GRANDE PROPERTY OWNERS ASSOCIATION; STEVE CRAIG DOSSENBACK; MATIE BELLE LAKISH; DENNIS KEITH ISSELMANN; CONNIE ESTRADA; AYLA DANIELLE HOEVERS; JANE ELIZABETH BROOKS; JOANNA B. THERIAULT,

Defendants - Appellees.

No. 20-1413
(D.C. No. 1:18-CV-02572-RM-KMT)
(D. Colo.)

ORDER AND JUDGMENT*

Before **McHUGH**, **BALDOCK**, and **MORITZ**, Circuit Judges.

Bayardo Reno Sandy, proceeding pro se, appeals from the district court's grant of summary judgment to the defendants in his suit against his property owners'

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

association and its directors and employees. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

Mr. Sandy is a longtime member of The Baca Grande Property Owners Association (BGPOA). BGPOA's covenants and bylaws govern owners' ability to build residences and outbuildings on their properties. The Environmental and Architectural Committee (EAC) reviews plans and issues or denies construction permits. BGPOA's Board has oversight authority over the EAC, including the ability to grant variances.

In May 2013, the EAC issued Mr. Sandy a permit to build a residence. The permit was valid for eighteen months, until November 2014. Mr. Sandy started work, but he did not substantially complete his home before the permit expired. From November 2014 to November 2017, the EAC granted four six-month extensions and a one-year moratorium due to injuries Mr. Sandy suffered in a motor vehicle accident. In November 2017, however, the EAC denied Mr. Sandy's application for a fifth extension, stating he had not made substantial progress toward completing his home and his sanitation plan was insufficient. Mr. Sandy appeared before BGPOA's Board to discuss the decision, but the Board did not overrule the EAC's denial of the extension.

Mr. Sandy is Latino and a naturalized citizen. Alleging that BGPOA had treated him differently than Caucasian, native-born owners, he filed a pro se suit in federal district court. He then retained counsel, who filed a first amended complaint

alleging violations of 42 U.S.C. §§ 1981, 1983, and 1985; the Fair Housing Act, 42 U.S.C. § 3617; 24 C.F.R. § 100.7; and Colorado law. Shortly thereafter, dissatisfied with his attorney's performance, Mr. Sandy resumed representing himself and sought leave to further amend the complaint, which the district court denied.

After discovery, the district court granted summary judgment to the defendants on all of Mr. Sandy's claims. Mr. Sandy then filed a Motion for a New Trial and a Motion for Leave to File Supplemental Evidence and Transcripts Not Available Before Court Order, which the district court denied. Mr. Sandy now appeals from the grant of summary judgment on his §§ 1983 and 3617 claims[1] and the denial of his post-judgment motions.

DISCUSSION

I. Alleged District Court Bias

To start, Mr. Sandy suggests that he was deprived of due process because the district court was biased against him. He alleges that his former counsel and the district judge "were former professional colleagues," which "may have hindered [his] ability to proceed in District [Court] without being a victim of animus." Aplt. Opening Br. at 3. He complains that the magistrate judge did not penalize the defendants for failing to disclose the existence of a parallel state-court proceeding for 157 days, and that she "pre-judically labeled [Mr. Sandy] as 'recalcitrant' in a minute

[1] Mr. Sandy has abandoned his other claims by failing to argue them in his opening brief. *See Tran v. Trs. of State Colls. in Colo.*, 355 F.3d 1263, 1266 (10th Cir. 2004) ("Issues not raised in the opening brief are deemed abandoned or waived." (internal quotation marks omitted)).

order," *id.* at 5 (underlining and italics omitted). He further asserts that the district court accepted perjured testimony; that the court's statement that he had not made relevant, coherent arguments regarding certain claims indicated that it did not read the materials he supplied; and that the defendants must have drafted the summary judgment order, given that it did not discuss those arguments.

We detect no due process violation due to judicial bias or prejudice. The unsupported allegations regarding the district judge and former counsel are mere speculation and conjecture, which is insufficient to require recusal, *see United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993). Moreover, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994).

The magistrate judge did state, in a minute order setting a status conference after Mr. Sandy missed his deposition, that "[t]he Federal Rules of Civil Procedure give a district court ample tools to deal with recalcitrant litigants." R. Vol. 1 at 336. But it is not clear that she was characterizing Mr. Sandy as "recalcitrant," rather than simply warning that the court would address any recalcitrance found to exist. In any event, "judicial remarks . . . that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky*, 510 U.S. at 555. The statement does not reveal "such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id*.

The district court's recitation of the facts in the summary judgment order, including the allegedly perjured statement, do not evidence bias (and in any event,

the allegedly perjured statement was not material to the grounds on which the district court granted summary judgment to the defendants). And finally, there is no indication that the district court failed to read Mr. Sandy's filings or that the defendants drafted the summary judgment order. To the contrary, the district court refuted those unsupported allegations in denying the post-judgment motions.

II. Summary Judgment

A. Standard of Review

We review the district court's grant of summary judgment de novo, viewing the evidence in the light most favorable to Mr. Sandy as the non-moving party. *See Janny v. Gamez*, 8 F.4th 883, 898-99 (10th Cir. 2021). Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). We read Mr. Sandy's pro se filings liberally, but he must "follow the same rules of procedure that govern other litigants." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (internal quotation marks omitted). We "cannot take on the responsibility of serving as [his] attorney in constructing arguments and searching the record." *Id.*

B. 42 U.S.C. § 1983 Claim

Mr. Sandy challenges the district court's grant of summary judgment to the defendants on his § 1983 claim. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other

> person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

The district court held that Mr. Sandy had not established that the defendants, who are a private entity and private individuals, acted "under color of" law. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (recognizing that "the under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful" (internal quotation marks omitted)). Mr. Sandy argues that he established the under-color-of-state-law requirement under several tests set forth in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

"When a constitutional claim is asserted against private parties, to be classified as state actors under color of law they must be jointly engaged with state officials in the conduct allegedly violating the federal right." *Janny*, 8 F.4th at 919 (internal quotation marks omitted). "The Supreme Court has delineated various tests for analyzing the state actor requirement: public function, state compulsion, nexus, and joint action." *Id.* (citing *Lugar*, 457 U.S. at 939).

In support of his argument regarding the *Lugar* tests, Mr. Sandy primarily relies on materials submitted with (or, in the case of new testimony, described in) his post-judgment Motion for Leave to File Supplemental Impeachable Evidence. As discussed below in Section III, however, the district court did not abuse its discretion in denying leave to file the late-submitted evidence. We therefore do not consider that evidence.

Without the late-submitted evidence, Mr. Sandy must show error based on the record before the district court at the time it ruled on the summary judgment materials. In this regard, invoking the joint action and nexus tests, he relies on a letter from a Sagauche County official stating that "[f]or the past several years Sagauche County and the Baca Grande Property Owners Association [have] worked together to issue permits to property owners. We do this to try to work together to prevent violations of Sagauche County regulations and Baca Grande Property Owners covenants." R. Vol. 5 at 41.[2]

"Under the joint action test, courts examine whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights." *Janny*, 8 F.4th at 919 (internal quotation marks omitted). And "[f]or a private party to qualify as a state actor under the nexus test, a plaintiff must demonstrate that there is a sufficiently close nexus between the government and the challenged conduct by the private party such that the conduct may be fairly treated as that of the State itself." *Id.* at 925 (internal quotation marks omitted). For both tests, it is insufficient to show only that government officials merely approved or acquiesced to the actions of a private party. *Id.* at 919, 925.

[2] Relying on a provision of BGPOA's bylaws, Mr. Sandy also makes a brief argument regarding the public function test. But he does not show that he cited that provision to the district court, and we generally do not consider new arguments on appeal absent a showing of plain error, *see Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130-31 (10th Cir. 2011).

The Sagauche County letter does not satisfy either the joint action or nexus tests. It does not establish that the county knew of or participated in any deprivations of Mr. Sandy's constitutional rights, or that there was such a close relationship between the county and BGPOA that BGPOA's actions may fairly be treated as the actions of the county. At most, it may evidence approval or acquiescence by the county, but that does not establish that BGPOA acted under color of law. *See id.*

We thus affirm the judgment in favor of the defendants on the § 1983 claim.

C. 42 U.S.C. § 3617 Claim

Mr. Sandy also asserts that the district court erred in granting summary judgment to the defendants on his 42 U.S.C. § 3617 Fair Housing Act claim. Section 3617 provides:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.

In turn, the cross-referenced sections prohibit discrimination in the sale or rental of housing (§§ 3603, 3604), in specified residential real estate-related transactions (§ 3605), and in the provision of brokerage services (§ 3606).

Although Mr. Sandy alleges coercion and intimidation, his claims concern BGPOA's permitting process. They do not involve discrimination in the sale or rental of housing, the real estate-related transactions covered by § 3605, or the provision of brokerage services. He therefore does not allege coercion and intimidation "in the exercise or enjoyment of, or on account of his having exercised

or enjoyed . . . *any right granted or protected by section 3603, 3604, 3605, or 3606*." § 3617 (emphasis added). Because the plain language of § 3617 requires him to connect the alleged coercion and intimidation with the rights protected under the cross-referenced sections, his § 3617 claim cannot proceed.

Mr. Sandy relies on an excerpt from a filing by the United States in a different district court case to argue that "coercion under § 3617 . . . does not exclusively apply to real estate transactions." Aplt. Opening Br. at 9 (italics omitted). In that case, the United States quoted the Ninth Circuit:

> Section 3617 does not necessarily deal with a discriminatory housing practice, or with the landlord, financer or brokerage service guilty of such practice. It deals with a situation where no discriminatory housing practice may have occurred at all because the would-be tenant has been discouraged from asserting his rights, or because the rights have actually been respected by persons who suffer consequent retaliation. It also deals with situations in which the fundamental inequity of a discriminatory housing practice is compounded by coercion, intimidation, threat or interference.

United States of America's Statement of Interest, *Arnal v. Aspen View Condo. Ass'n, Inc.*, No. 15-cv-01044, at 5 (D. Colo. July 15, 2016) (quoting *Smith v. Stechel*, 510 F.2d 1162, 1164 (9th Cir. 1975)).[3] This excerpt, however, does not support Mr. Sandy's case. Although *Smith* speaks to the scope of coercion and intimidation, we do not read it to mean that that *any* coercion or intimidation is actionable under § 3617. Rather, we understand it to refer to coercion and intimidation posing barriers to the exercise of the rights protected by §§ 3603, 3604, 3605, and 3606.

[3] "[W]e may take judicial notice of public records, including district court filings." *Guttman v. Khalsa*, 669 F.3d 1101, 1127 n.5 (10th Cir. 2012).

We thus affirm the judgment in favor of the defendants on the § 3617 claim.

III. Post-Judgment Motions

The district court treated Mr. Sandy's Motion for a New Trial as a motion under Fed. R. Civ. P. 59(e) or Fed. R. Civ. P. 60(b). And Mr. Sandy filed his Motion for Leave to File Supplemental Impeachable Evidence under Rule 60(b)(2). We review the denials of both Rule 59(e) and Rule 60(b) motions for abuse of discretion. *See F.D.I.C. v. Arciero*, 741 F.3d 1111, 1117 (10th Cir. 2013).

The district court did not abuse its discretion in denying the Motion for a New Trial. The motion alleged that the district court was biased, complained that it had not discussed certain arguments, and reargued the merits. As the district court concluded, the motion did not establish any grounds recognized by Rule 59(e) or Rule 60(b). Further, as discussed above, Mr. Sandy's allegations about alleged bias were unsupported, and the district court specifically refuted the allegations that it had failed to read Mr. Sandy's submissions and had allowed the defendants to draft the summary judgment order.

The district court also did not abuse its discretion in denying the Motion for Leave to File Supplemental Impeachable Evidence. For relief under Rule 60(b)(2), the moving party must show:

> (1) the evidence was newly discovered since the trial; (2) the moving party was diligent in discovering the new evidence; (3) the newly discovered evidence was not merely cumulative or impeaching; (4) the newly discovered evidence is material; and (5) a new trial with the newly discovered evidence would probably produce a different result.

Arciero, 741 F.3d at 1117 (ellipsis omitted). While the district court recognized that the evidence included new testimony, it noted that Mr. Sandy "offer[ed] no explanation as to why he could not have obtained [the] testimony sooner, if in fact it is relevant to this case." R. Vol. 5 at 256. The court further held he had failed to show the evidence was not merely cumulative or impeaching and would probably produce a different result.

On appeal, Mr. Sandy's opening brief generally alleges that the district court should have considered his new evidence. But he does not address the district court's reasons for denying the Rule 60(b)(2) motion, including that he had not shown any reason that he could not have discovered the evidence earlier, had he exercised diligence. He therefore has failed to show that the district court abused its discretion in denying the motion. *See Dronsejko v. Thornton*, 632 F.3d 658, 672 (10th Cir. 2011) ("Actual diligence is one of the requirements for relief under Rule 60(b)(2).").

CONCLUSION

We affirm the district court's judgment.

Entered for the Court

Carolyn B. McHugh
Circuit Judge