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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Frank Konarski, husband; et al., Plaintiffs, vs. City of Tucson, a body politic; et al., Defendants.	No. CIV 11-612-TUC-LAB **ORDER**

Pending before the court is the defendants' motion for partial summary judgment filed on May 31, 2012. (Doc. 22)

The plaintiffs in this case rent housing to low income tenants. (Doc. 1-6) The defendant, City of Tucson, is the local housing authority that administers the federal Section 8 housing program, which give rental assistance to low income families. *Id*. The individual defendants, Albert Elias, Peggy Morales, and Julianne Hughes, work for the City. *Id*. In May of 2010, the City vetted the plaintiffs' housing units and agreed to enter into housing assistance payment (HAP) contracts with the plaintiffs for the benefit of three prospective tenants. *Id*. In June of 2010, however, the City notified the plaintiffs that it was rescinding the HAP agreements. *Id*. On the basis of that rescission, the plaintiffs bring this action for breach of contract, bad faith, intentional interference with contract, intentional infliction of emotional distress, conspiracy, and violation of civil rights. *Id*. The action was originally filed in Pima County Superior Court, but it was removed by the defendants based on this court's federal question jurisdiction.

The defendants move for partial summary judgment pursuant to Fed.R.Civ.P. 56(c). They argue the state law claims against the individual defendants must be dismissed pursuant to the Arizona notice of claims statute, A.R.S. § 12-821.01. They further argue the plaintiffs' civil rights claim should be dismissed on res judicata grounds or, in the alternative, on the merits.

Magistrate Judge Bowman presides over this case having received written consent from all parties. 28 U.S.C. §636.

The court finds the plaintiffs' civil rights claim should be denied on the merits. The only federal claim having been resolved, the court will remand the action to the state court. The court does not reach the notice of claims issue.

Factual and Procedural Background

The plaintiffs are in the business of renting housing to low income tenants. (Doc. 1-6, pp. 4-5) In May of 2012, three prospective tenants indicated their desire to rent from the plaintiffs. *Id*. The plaintiffs submitted to the City of Tucson the paperwork necessary to apply for federal Section 8 rental assistance on their behalf. *Id*. The City performed the necessary housing inspections, and agreed to enter into housing assistance payment (HAP) contracts with the plaintiffs. *Id*. On June 3, 2010, however, the plaintiffs were informed by letter that the City was rescinding the HAP contracts. *Id*.

There is, apparently, a long history of animosity between the parties. In 2001, the City sent the plaintiff, Frank Konarski, a letter stating "we will no longer initiate new [Section 8] contracts with you due to the numerous complaints expressed by the tenants and the continuing problems imposed on our staff." (Doc. 23-2, p. 2) The plaintiffs suspect the city rescinded the HAP contracts in this case for similar reasons. (Doc. 1-6, p. 11)

On November 24, 2010, the plaintiffs served four copies of their notice of claim with the City Clerk. (Doc. 1-6, p. 5)

The plaintiffs subsequently initiated this action by filing a complaint in Pima County Superior Court. They filed an amended complaint on August 30, 2011, claiming breach of contract, bad faith, intentional interference with contract, intentional infliction of emotional distress, conspiracy, and violation of civil rights. (Doc. 1-6) On September 26, 2011, the defendants removed the action based on this court's federal question jurisdiction, 28 U.S.C. § 1331. (Doc. 1, p. 2)

On May 31, 2012, the defendants filed the pending motion for partial summary judgment. (Doc. 22) They argue the state law claims against the individual defendants, Albert Elias, Peggy Morales, and Julianne Hughes, must be dismissed because the plaintiffs failed to serve them personally with a notice of claim. *Id*. They further argue the plaintiffs' civil rights claim must be dismissed either on res judicata grounds or on the merits. (Docs. 22, 37)

The defendants addressed the merits of the civil rights claim for the first time in the reply brief. (Doc. 37) Accordingly, the court offered the plaintiffs an opportunity to file a sur-reply addressing the issue. (Doc. 68); *see also* Fed.R.Civ.P. 56(f).

A hearing on the motion was held on November 26, 2012. (Doc. 60)

Standard of Review: Summary Judgment

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). There is a genuine issue of material fact "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986).

The initial burden rests on the moving party to point out the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party has the burden of proof at trial, that party carries its initial burden by presenting evidence showing no reasonable trier of fact could find for the nonmoving party. *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986); *United States v. Four Parcels of Real Property*, 941 F.2d 1428,

1438 (11th Cir. 1991). If the moving party does not have the burden of proof at trial, that party carries its initial burden either by presenting evidence negating an essential element of the nonmoving party's claim or demonstrating the nonmoving party cannot meet its burden at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Nissan Fire & Marine Insurance v. Fritz*, 210 F.3d 1099 (9th Cir. 2000).

Once satisfied, the burden shifts to the nonmovant to demonstrate through production of probative evidence that an issue of fact remains to be tried. *Celotex*, 477 U.S. at 324. Summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Thomas v. Douglas*, 877 F.2d 1428, 1430 (9th Cir. 1989).

When considering a motion for summary judgment, the court is not to make credibility determinations or weigh conflicting evidence. *Musick v. Burke*, 913 F.2d 1390, 1394 (9th Cir. 1990). Instead, the court should draw all inferences in the light most favorable to the nonmoving party. *Id.*

The court finds that summary judgment should be granted on plaintiffs' civil rights claim on the merits. The court does not reach the defendants' res judicata argument.

DISCUSSION: Civil Rights

The plaintiffs allege the City's decision to cancel the HAP contracts deprives them of their liberty right to pursue their chosen occupation in violation of due process. (Doc. 1-6, pp. 11-12)

The Fourteenth Amendment precludes the states from "depriv[ing] any person of life, liberty, or property without due process of law." "[T]he liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment." *Dittman v. California*, 191 F.3d 1020, 1031(9th Cir. 1999). This right, however, only protects against state action that works "a complete prohibition on the right

to engage in a calling, and not a sort of brief interruption." *Guzman v. Shewry*, 552 F.3d 941, 954 (9th Cir. 2009).

In this case, the City's decision to rescind the HAP contracts does not constitute a complete bar against the plaintiffs' ability to pursue their livelihood as landlords. They are free to rent to other tenants in the private housing market. They are free to participate in other housing subsidy programs. The City's rescission might make it more difficult for the plaintiffs to make their living, but it does not create an absolute prohibition. Accordingly, the plaintiffs cannot establish a liberty interest in the HAP contracts that were rescinded by the City. *See, e.g., Khan v. Bland*, 630 F.3d 519, 535 (7th Cir. 2010) ("[K]han cannot establish a liberty interest in continued participation in the Section 8 program. . . ."); *see also Llamas v. Butte Community College Dist.*, 238 F.3d 1123, 1128 -1129 (9th Cir. 2001) ("The decision to bar Llamas from future employment with the District did not violate his due process rights."). There is no genuine issue of material fact on this issue, and the defendants are entitled to judgment as a matter of law.

The plaintiffs further allege the City's decision violates the Equal Protection Clause on a "class of one" theory. (Doc. 1-6, pp. 11-12)

"The Supreme Court has recognized that an equal protection claim can in some circumstances be sustained even if the plaintiff has not alleged class-based discrimination, but instead claims that she has been irrationally singled out as a so-called 'class of one.'" *Gerhart v. Lake County, Mont.*, 637 F.3d 1013, 1021 (9th Cir. 2011) (punctuation modified). "To succeed on her 'class of one' claim, [the plaintiff] must demonstrate that the [defendant]: (1) intentionally (2) treated [the plaintiff] differently than other similarly situated [applicants], (3) without a rational basis." *Gerhart*, 637 F.3d at 1022.

In this case, the plaintiffs have produced no admissible evidence tending to prove the City acted "without a rational basis." In fact, it appears that the rescission was based on the City's perception that the defendant, Frank Konarski, is difficult to deal with. In 2001, Adolph Valfre, Jr., then the City's administrator of housing assistance programs, penned a fairly detailed

summary of the reasons why the City had decided to no longer initiate new Section 8 contracts with Konarski. (Doc. 23-2) Among other things, Valfre cited "Mr. Konarski's unrelenting verbal abuse and excessive demands on the Housing Authority's limited personnel resources and time." (Doc. 23-2, pp. 4-7) He further cited "numerous complaints by minority tenants," a 1994 Unlawful Housing Practices judgment, and a pattern of behavior constituting "abuse, discrimination or harassment of clients, thereby denying a suitable living environment for families living in assisted housing." *Id*.

The plaintiffs argue this letter is hearsay and therefore inadmissible. (Doc. 34, pp. 2, 6) They are correct but only to a point. The letter would be hearsay if it were admitted to prove the truth of the matter asserted, that Konarski acted poorly in the past. It would not be hearsay if it were admitted to show why the City rescinded the HAP agreements, i.e., the agreements were rescinded because the City's internal documents indicate that Konarski is very difficult to deal with. *See, e.g., Vazquez-Valentin v. Santiago-Diaz*, 459 F.3d 144, 151 (1st Cir. 2006) ("[O]ffered as an explanation for the personnel actions undertaken by the defendants rather than for the truth of the personnel irregularities described in the documents, these documents are not hearsay."). And, that is what the defendants have to show to shift the burden of production to the plaintiffs to prove that an issue of fact remains to be tried. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Nissan Fire & Marine Insurance v. Fritz*, 210 F.3d 1099 (9th Cir. 2000).

The plaintiffs allege in their complaint that the rescission was caused by "Defendant Morales' 'personal vendetta'" but they present no admissible evidence in support of their theory. (Doc. 1-6, p. 13); *see also Orr v. Bank of America, NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002) ("A trial court can only consider admissible evidence in ruling on a motion for summary judgment."). In their sur-reply, they argue the City has, in the past, contracted with landlords who had been convicted of violent crimes. (Doc. 78, p. 15) Unfortunately, they provide no evidentiary support for this assertion. They maintain they have an existing Section 8 tenant who has rented from them for the past 20 years. They do not explain, however, how this fact supports their "personal vendetta" theory. This might be some evidence that the

plaintiffs are able to properly maintain their apartments, but it does not appear to have any bearing on the City's decision to rescind the HAP contracts in this case. If the defendant, Morales, had a personal vendetta against the plaintiffs, presumably she would have cancelled all of the plaintiffs existing HAP contracts, not just the three new ones. The plaintiffs cannot show the City acted without a rational basis. Accordingly, the plaintiffs have not shown there is a genuine issue of material fact on this issue. The City is entitled to judgment as a matter of law. *See, e.g., Lindquist v. City of Pasadena Texas*, 669 F.3d 225, 237 (5th Cir. 2012) ("[T]he Lindquists cannot show that the City Council acted irrationally when it denied their appeal.").

At the hearing, counsel for the plaintiffs argued that the defendants' actions violated the plaintiffs' civil rights pursuant to 42 U.S.C. §§ 1981 and 2000d. These claims, however, do not appear in the plaintiffs' amended complaint. (Doc. 1-6) The § 1981 clam appears in a proposed second amended complaint, which was the subject of the plaintiffs' motion to amend filed on August 6, 2012. (Doc. 35-1, pp. 12-15) The motion to amend was denied on November 13, 2012. (Doc. 73)

Remand

This court has original jurisdiction over the civil rights claim pursuant to 28 U.S.C. § 1331. This court has supplemental jurisdiction over the state law claims because they arise from the same case and controversy pursuant to 28 U.S.C. § 1367.

Where removal is based on a claim later dismissed, the court may decline to exercise jurisdiction over the remaining claims after properly considering the competing virtues of "economy, convenience, fairness, and comity." *Acri v. Varian Associates*, 114 F.3d 999, 1001 (9th Cir. 1997) (en banc); 28 U.S.C. § 1367(c)(3). Ordinarily, the balance of factors will point to declining jurisdiction. *Carnegie-Mellon University v. Cohill,* 484 U.S. 343, 350 n.7 (1988).

In this case, the remaining claims present issues of state procedural and substantive law. In the interest of comity, and in light of the state court's superior expertise on questions of state law, the remaining claims will be remanded to the state court. Accordingly,

IT IS ORDERED that the defendants' motion for partial summary judgment filed on May 31, 2012, is GRANTED in PART. (Doc. 22) The defendants are granted summary judgment on the plaintiffs' civil rights claim.

The court declines to assert supplemental jurisdiction over the remaining state law claims, and therefore, the remainder of the motion is denied without prejudice.

The action is remanded to Pima County Superior Court.

All outstanding motions are denied as moot. (Docs. 42, 59, 66, 67, 72, 75, 83, 87)

The Clerk is directed to enter judgment accordingly.

DATED this 3rd day of December, 2012.

Leslie A. Bowman

Leslie A. Bowman
United States Magistrate Judge