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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SUE ELLEN HOLMSTRAND,
Plaintiff,

No. 2:10-cv-01751-MCE-GGH

v.

MEMORANDUM AND ORDER

DIXON HOUSING PARTNERS, LP;
SIMPSON HOUSING, LLLP; MCA
HOUSING PARTNERS, LLC;
FOUNDATION FOR AFFORDABLE
HOUSING, INC.; FPI MANAGEMENT,
INC.; and DOES ONE through
TWENTY,

Defendants.

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This action arises from the previous tenancy of Plaintiff Sue Ellen Holmstrand ("Plaintiff") at an apartment complex allegedly owned and operated by Dixon Housing, LP ("Dixon"), MCA Housing Partners, LLC ("MCA"), the Foundation for Affordable Housing, Inc. ("FAH"), and FPI Management, Inc. ("FPI") (collectively, "Defendants").

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1 Plaintiff seeks redress for Defendants' alleged refusal to allow
2 her to form a tenants association, in violation of the First and
3 Fourteenth Amendments, and for Defendants' alleged unauthorized
4 entry into her apartment and destruction of her personal
5 property, in violation of the Fourteenth Amendment. Plaintiff
6 also seeks redress for intentional infliction of emotional
7 distress under California state law. Defendants have filed
8 separate motions to dismiss Plaintiff's Second Amendment
9 Complaint for failure to state a claim upon which relief may be
10 granted, pursuant to Federal Rule of Civil Procedure 12(b)(6).¹
11 (ECF Nos. 32-1, 37.) For the reasons set forth below,
12 Defendants' Motions to Dismiss are granted.²

13
14 **BACKGROUND³**
15

16 Plaintiff is legally disabled, and was a resident of the
17 Second Street Senior Apartments in Dixon, California from October
18 2007 to May 2008. The Second Street Apartments were developed
19 under the Low Income Housing Tax Credit program, which is
20 designed to increase the availability of affordable housing by
21 encouraging private investment in such housing.

22 _____
23 ¹ Dixon, MCA and FAH filed a Motion to Dismiss on April 13,
24 2011. (ECF No. 32-1.) FPI filed its Motion to Dismiss on
May 12, 2011. (ECF No. 37.)

25 ² Because oral argument will not be of material assistance,
26 the Court orders this matter submitted on the briefs. E.D. Cal.
Local Rule 230(h).

27 ³ The factual assertions in this section are based on the
28 allegations in Plaintiff's Second Amended Complaint unless
otherwise noted.

1 The "encouragement" is a tax credit to the private investors.
2 Defendant DHA is the owner of the property, and Defendant FAH is
3 the general partner of Defendant DHA. Defendant FPI is a
4 property management company. The true capacity of Defendant MCA
5 is unknown as regards to the Second Street Apartments.

6 In November 2007, the manager of the Second Street
7 Apartments, Carolyn Kennedy, gave notice to the tenants that the
8 building was being sold and that there would be frequent
9 inspections of individual apartments. Ms. Kennedy informed
10 tenants that they would be given no further notice before
11 management could enter apartments, and further informed tenants
12 that they could be evicted for dirty apartments or other breaches
13 of their leases. Plaintiff objected, stating that she would not
14 allow inspection of her apartment without forty-eight hours'
15 notice.

16 In November 2007, Plaintiff asked Ms. Kennedy for permission
17 to use the Second Street Apartments' clubhouse to hold a meeting
18 for tenants to inform them of their legal rights. Ms. Kennedy
19 denied Plaintiff use of the clubhouse. Plaintiff again requested
20 use of the clubhouse in November and December 2007, and January
21 2008. Ms. Kennedy denied Plaintiff's request each time. Tenants
22 were threatened with eviction if they supported a tenants
23 association. In April and May 2008, Plaintiff attempted to
24 advocate for additional handicapped parking spots at the Second
25 Street Apartments, to no avail.

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1 On May 30, 2008, Defendants served Plaintiff with an
2 unlawful detainer action. Plaintiff agreed to move out of her
3 apartment by July 31, 2008. On July 15, 2008, while the unlawful
4 detainer proceedings were pending, Defendants entered Plaintiff's
5 apartment and removed and destroyed Plaintiff's personal
6 property. Plaintiff made repeated attempts to contact the
7 management of the Second Street Apartments regarding the
8 destruction of her property, but her calls were never returned.
9 No property was returned to Plaintiff.

10
11 **STANDARD**

12 **A. Lack of Subject Matter Jurisdiction**

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14 Federal courts are courts of limited jurisdiction, and are
15 presumptively without jurisdiction over civil actions. Kokkonen
16 v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). The
17 burden of establishing the contrary rests upon the party
18 asserting jurisdiction. Id. Because subject matter jurisdiction
19 involves a court's power to hear a case, it can never be
20 forfeited or waived. United States v. Cotton, 535 U.S. 625, 630
21 (2002). Accordingly, lack of subject matter jurisdiction may be
22 raised by the district court sua sponte. Ruhrigas AG v. Marathon
23 Oil Co., 526 U.S. 574, 583 (1999). Indeed, "courts have an
24 independent obligation to determine whether subject matter
25 jurisdiction exists, even in the absence of a challenge from any
26 party." Id.; see Fed. R. Civ. P. 12(h)(3) (requiring the court
27 to dismiss the action if subject matter jurisdiction is lacking).
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1 **B. Failure to State a Claim**

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3 On a motion to dismiss for failure to state a claim under

4 Federal Rule of Civil Procedure 12(b)(6),⁴ all allegations of

5 material fact must be accepted as true and construed in the light

6 most favorable to the nonmoving party. Cahill v. Liberty Mut.

7 Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). Rule 8(a)(2)

8 requires only "a short and plain statement of the claim showing

9 that the pleader is entitled to relief" in order to "give the

10 defendant fair notice of what the [...] claim is and the grounds

11 upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544,

12 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). A

13 complaint attacked by a Rule 12(b)(6) motion to dismiss does not

14 require detailed factual allegations. However, "a plaintiff's

15 obligation to provide the grounds of his entitlement to relief

16 requires more than labels and conclusions, and a formulaic

17 recitation of the elements of a cause of action will not do."

18 Id. (internal citations and quotations omitted). A court is not

19 required to accept as true a "legal conclusion couched as a

20 factual allegation." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950

21 (2009) (quoting Twombly, 550 U.S. at 555). "Factual allegations

22 must be enough to raise a right to relief above the speculative

23 level."

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28 ⁴ All further references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure unless otherwise noted.

1 Twombly, 550 U.S. at 555 (citing 5 Charles Alan Wright & Arthur
2 R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004)
3 (stating that the pleading must contain something more than “a
4 statement of facts that merely creates a suspicion [of] a legally
5 cognizable right of action.”)).

6 Furthermore, “Rule 8(a)(2)...requires a showing, rather than
7 a blanket assertion, of entitlement to relief.” Twombly,
8 550 U.S. at 556 n.3 (internal citations and quotations omitted).
9 Thus, “[w]ithout some factual allegation in the complaint, it is
10 hard to see how a claimant could satisfy the requirements of
11 providing not only ‘fair notice’ of the nature of the claim, but
12 also ‘grounds’ on which the claim rests.” Id. (citing 5 Charles
13 Alan Wright & Arthur R. Miller, supra, at § 1202). A pleading
14 must contain “only enough facts to state a claim to relief that
15 is plausible on its face.” Id. at 570. If the “plaintiffs...
16 have not nudged their claims across the line from conceivable to
17 plausible, their complaint must be dismissed.” Id. However,
18 “[a] well-pleaded complaint may proceed even if it strikes a
19 savvy judge that actual proof of those facts is improbable, and
20 ‘that a recovery is very remote and unlikely.’” Id. at 556
21 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

22 A court granting a motion to dismiss a complaint must then
23 decide whether to grant leave to amend. Leave to amend should be
24 “freely given” where there is no “undue delay, bad faith or
25 dilatory motive on the part of the movant,...undue prejudice to
26 the opposing party by virtue of allowance of the amendment, [or]
27 futility of the amendment....”

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1 Foman v. Davis, 371 U.S. 178, 182 (1962); Eminence Capital, LLC
2 v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (listing the
3 Foman factors as those to be considered when deciding whether to
4 grant leave to amend). Not all of these factors merit equal
5 weight. Rather, "the consideration of prejudice to the opposing
6 party...carries the greatest weight." Id. (citing DCD Programs,
7 Ltd. v. Leighton, 833 F.2d 183, 185 (9th Cir. 1987). Dismissal
8 without leave to amend is proper only if it is clear that "the
9 complaint could not be saved by any amendment." Intri-Plex
10 Techs. v. Crest Group, Inc., 499 F.3d 1048, 1056 (9th Cir. 2007)
11 (citing In re Daou Sys., Inc., 411 F.3d 1006, 1013 (9th Cir.
12 2005); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160
13 (9th Cir. 1989) ("Leave need not be granted where the amendment
14 of the complaint...constitutes an exercise in futility....").

15 16 ANALYSIS

17 A. Lack of Subject Matter Jurisdiction

18
19 Plaintiff's first cause of action asserts that Defendants
20 violated her right to "peacefully assemble, speak and petition
21 for redress of grievances, and otherwise address rights under
22 both the laws of the State of California and the Constitution of
23 the United States" by denying Plaintiff the use of the Second
24 Street Apartments' clubhouse for a tenants meeting. (Pl.'s 2d
25 Am. Compl., 12:13-17, ECF No. 31.) Plaintiff further alleges
26 that tenants were threatened with eviction if they supported a
27 tenants association. (Pl.'s 2d Am. Compl., 12:18, ECF No. 31.)

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1 Plaintiff's second cause of action alleges that Defendants
2 violated her Fourteenth Amendment Right to equal protection.

3 Plaintiff asserts that because she seeks redress for
4 violations of her First and Fourteenth Amendment rights, the
5 Court has jurisdiction over Plaintiff's lawsuit. (Pl.'s 2d Am.
6 Compl., 5:11-15, ECF No. 31.) Plaintiff claims that jurisdiction
7 arises from 28 U.S.C. §§ 2201-02. Under 28 U.S.C. § 2201, a
8 federal court may declare a plaintiff's rights "[i]n a case of
9 actual controversy within its jurisdiction." 28 U.S.C. § 2201
10 (2006) (emphasis added). Article III, Section 2 of the
11 Constitution provides that the federal courts shall have
12 jurisdiction over "all Cases, in Law and Equity, arising under
13 this Constitution, the Laws of the United States, and Treaties
14 made...." U.S. Const. art. III, § 2.

15 The First Amendment of the Constitution provides that
16 "Congress shall make no law...abridging the freedom of speech, or
17 of the press; or of the right of the people peaceably to
18 assemble, and to petition the Government for a redress of
19 grievances." U.S. Const. amend. I. The rights enumerated in the
20 First Amendment apply to state and local government actors
21 through the Fourteenth Amendment. See, e.g., Cantwell v. Conn.,
22 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty
23 embodied in [the Fourteenth] Amendment embraces the liberties
24 guaranteed by the First Amendment."). The Fourteenth Amendment
25 provides in relevant part that "[n]o State shall...deny to any
26 person within its jurisdiction the equal protection of the laws."
27 U.S. Const. amend. XIV, § 1.

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1 The United States Constitution protects individual rights,
2 including those rights enumerated in the First and Fourteenth
3 Amendments, from government action only. Jackson v. Metro.
4 Edison Co., 419 U.S. 345, 349 (1974); Single Moms, Inc. v. Mont.
5 Power Co., 331 F.3d 743, 746 (9th Cir. 2003). "Only when the
6 government is responsible for a plaintiff's complaints are
7 individual constitutional rights implicated." Single Moms, Inc.,
8 331 F.3d at 747 (emphasis in original) (citing Brentwood Acad. v.
9 Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001)).
10 Thus, to state a claim for a violation of a Constitutional right,
11 a plaintiff must show that the alleged violation was "fairly
12 attributable to the federal or state government." Lugar v.
13 Edmondson Oil Co., 457 U.S. 922, 936 (1982); Mathis v. Pac. Gas &
14 Elec. Co., 75 F.3d 498, 502 (9th Cir. 1996).

15 Accordingly, private individuals and private entities are
16 not normally liable for violations of most rights secured by the
17 Constitution. Lugar, 457 U.S. at 936. The Supreme Court has
18 held that a private actor may be characterized as a state actor
19 when there is a sufficient "nexus" between the state and the
20 private entity. Jackson, 419 U.S. at 351. In determining
21 whether the action of a private entity "may be treated as that of
22 the state," courts should consider the following four factors:

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1 (1) whether "the government compelled the action using its
2 coercive power or provided significant encouragement, either
3 overt or covert, for the action;" (2) whether the government and
4 the private actor willfully participated in the joint activity;
5 (3) whether the government controlled a nominally private actor;
6 and (4) whether the government delegated a "public function" to
7 the private actor. Single Moms, Inc., 331 F.3d at 747 (internal
8 citations and quotations omitted). "If there is no state action,
9 the inquiry ends." United States v. Int'l Bhd. of Teamsters,
10 941 F.2d 1292, 1297 (2d Cir. 1991).

11 In the present action, Plaintiff has failed to allege facts
12 sufficient to establish any state action. Plaintiff alleges that
13 Defendants received a tax credit through the Low Income Housing
14 Tax Credit program. (Pl.'s 2d Am. Compl., 2:4-9, ECF No. 31.)
15 Plaintiff also alleges that the Solano County Tax Assessor is a
16 co-owner of the Second Street Apartments. (Pl.'s 2d Am. Compl,
17 4:15, ECF No. 31.) However, these facts do not establish that
18 the government used its coercive power or encouraged Defendants
19 to violate Plaintiff's rights, that the government willfully
20 participated with Defendants in the joint activity of denying
21 Plaintiff's rights, that the government controlled any of the
22 nominally private Defendants, or that the government delegated a
23 public function to Defendants. In short, Plaintiff has failed to
24 establish a sufficient "nexus" between the private Defendants and
25 any state actor.

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1 Because Plaintiff has failed to allege a government action,
2 or any facts that would permit the Court to characterize the
3 private Defendants as government actors, Plaintiff does not have a
4 cause of action arising under the Constitution or the laws of the
5 United States. As such, the present action is not within the
6 Court's jurisdiction as set forth by Article III of the Constitution.

7
8 **B. Failure to State a Claim Upon Which Relief Can Be
9 Granted**

10 Plaintiff alleges both federal and state causes of action
11 and requests relief accordingly. The issue before the Court is
12 not the substance of these various claims, but whether Plaintiff
13 has pled sufficient facts as a general matter. While the
14 complaint does not need detailed factual allegations, it must
15 still provide sufficient facts alleged under a cognizable theory.
16 See supra.

17
18 **C. Plaintiff's First and Second Causes of Action**

19
20 Plaintiff alleges that Defendants violated Plaintiff's First
21 and Fourteenth Amendment rights by refusing to allow her to form
22 a tenants association, entering her home without permission, and
23 destroying her personal property. As indicated above, in order
24 for a plaintiff to properly bring suit against a private actor
25 for violations of these Constitutional rights, the plaintiff must
26 establish a sufficient "nexus" between the state and the private
27 entity may establish that a private actor is properly
28 characterized as a state actor. Jackson, 419 U.S. at 351.

1 However, Plaintiff has failed to plead any facts that establish
2 such a nexus between the state and Defendants in the present
3 case. See supra. Plaintiff has plead no facts that show that
4 the government coerced or encouraged Defendants to violate
5 Plaintiff's rights, that the government willfully participated in
6 Defendants' activities, that the government controlled
7 Defendants, or that the government delegated a public function to
8 Defendants. See supra; see also Single Moms, Inc., 331 F.3d at
9 747 (articulating the four factors for a court to consider).

10 Even assuming the Court had subject matter jurisdiction over
11 Plaintiff's claims, Plaintiff has failed to plead facts
12 sufficient to state a claim upon which relief can be granted.
13 While a complaint attacked by a Rule 12(b)(6) motion to dismiss
14 does not require detailed factual allegations, a plaintiff must
15 nonetheless provide "the grounds of his entitlement to relief."
16 Twombly, 550 U.S. at 555. A plaintiff must make a "showing,
17 rather than a blanket assertion, of entitlement to relief." Id.
18 at 556 n.3. In the present case, Plaintiff has failed to make
19 such a showing. Plaintiff has not pled facts sufficient to show
20 that Defendants may be properly characterized as state actors,
21 and Plaintiff has likewise failed to plead facts sufficient to
22 establish the requisite state action. Plaintiff has therefore
23 failed to state a claim upon which relief can be granted. Thus,
24 even were jurisdiction proper, Plaintiff's claims would
25 nonetheless fail under the standards of Rule 12(b)(6).
26 Defendants' Motions to Dismiss are therefore granted as to
27 Plaintiff's first and second causes of action.

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1 **D. Plaintiff's Remaining Cause of Action**

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3 Plaintiff's federal claims presently dismissed, the Court
4 declines to exercise supplemental jurisdiction over the remaining
5 state law causes of action. The Court need not address the
6 merits of the Motions to Dismiss with respect to the remaining
7 state law cause of action, as the issue is now moot.

8
9 **E. Leave to Amend**

10
11 Having granted Defendants' Motions to Dismiss, the Court
12 must decide whether to grant Plaintiff leave to amend. Leave to
13 amend should not be granted when doing so constitutes an exercise
14 in futility. Foman, 371 U.S. 178, 182. In the present action,
15 Plaintiff has filed three complaints, and each has failed to
16 properly state a cause of action. Allowing Plaintiff additional
17 amendments would, at this point, constitute an exercise in
18 futility. Furthermore, Plaintiff has no standing to bring the
19 claims that she asserts against Defendants in this lawsuit. See
20 supra. As such, the Court fails to understand how further
21 amendment could save the complaint. Accordingly, Defendants'
22 Motions to Dismiss are granted without leave to amend.

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1 **CONCLUSION**

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3 As a matter of law, and for the reasons set forth above,
4 Defendants' Motions to Dismiss (ECF Nos. 32-1, 37) Plaintiff's
5 Second Amended Complaint (ECF No. 31) are GRANTED without leave
6 to amend. The Clerk is ordered to close the case.

7 IT IS SO ORDERED.

8 Dated: June 29, 2011

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MORRISON C. ENGLAND, JR.
12 UNITED STATES DISTRICT JUDGE
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