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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CLARK FRATUS, et al.,
Plaintiffs,
v.
COUNTY OF CONTRA COSTA, et al.,
Defendants.

Case No. [14-cv-05533-MEJ](#)
DISCOVERY ORDER
Re: Dkt. No. 21

INTRODUCTION

This case arises out of Defendants’ code enforcement actions against Plaintiffs Clark and Karla Fratus’s properties in Contra Costa County. Pending before the Court is the parties’ Joint Discovery Letter, filed July 23, 2014, regarding Defendants’ demand for inspection of the properties. Dkt. No. 21 (“Jt. Ltr.”). Having considered the parties’ positions, relevant legal authority, and the record in this case, the Court issues the following order.

BACKGROUND

Plaintiffs’ lawsuit concerns two properties they own in the Oakley area of unincorporated Contra Costa County, 2284 and 2300 Dutch Slough Road. First Am. Compl. ¶¶ 1, 17, Dkt. No. 1-2. Each property is improved with a two-story, single-family residence. *Id.* ¶¶ 15, 17. In October 2007, Contra Costa County received a citizen complaint from a tenant at one of the properties reporting that unauthorized second units were being maintained at the residences. Jt. Ltr. at 2. The County contends the building permits on file for the properties authorize only one single-family residence per structure. *Id.* From 2007 to 2009, the County pursued building code and zoning enforcement actions against the properties. *Id.*; First Am. Compl. ¶¶ 20-34. Plaintiffs assert the County’s actions were devoid of any factual or legal support. Jt. Ltr. at 4. Plaintiffs

1 bring claims under 42 U.S.C. § 1983, alleging violations of their Fourteenth Amendment
2 Substantive Due Process and Equal Protection Rights; a First Amendment claim for retaliation;
3 and a state law claim for inverse condemnation. First. Am. Compl. ¶¶ 50-70. They seek recovery
4 of monetary damages, including damages for the loss or diminution in value to their properties,
5 and injunctive and declaratory relief. *Id.* at 16-17.

6 On May 28, 2015, the County served Plaintiffs with a Demand for Inspection of the two
7 Dutch Slough Road properties, noticed for July 7, 2015. Jt. Ltr., Ex. A (Demand). Defendants
8 maintain the purpose of the inspection is to allow the County’s real estate appraiser expert, Ms.
9 Alison Teeman of Yovino-Young, Inc., to inspect the residences as part of her valuation of the
10 properties and her evaluation of Plaintiffs’ diminution in value claims. Jt. Ltr. at 2. At Ms.
11 Teeman’s request, the County included a building inspector from its Building Inspection
12 Department for the purpose of identifying any conditions at the residences which may not be in
13 compliance with applicable Building Code provisions. *Id.*

14 **LEGAL STANDARD**

15 Federal Rule of Civil Procedure (“Rule”) 26 provides that a party may obtain discovery
16 “regarding any nonprivileged matter that is relevant to any party’s claim or defense.” Fed. R. Civ.
17 P. 26(b)(1). “Relevant information need not be admissible at the trial if the discovery appears
18 reasonably calculated to lead to the discovery of admissible evidence.” *Id.* A court “must limit
19 the frequency or extent of discovery otherwise allowed by [the Federal] rules” if “(i) the discovery
20 sought is unreasonably cumulative or duplicative, or can be obtained from some other source that
21 is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had
22 ample opportunity to obtain the information by discovery in the action; or (iii) the burden or
23 expense of the proposed discovery outweighs its likely benefit, considering the needs of the case,
24 the amount in controversy, the parties’ resources, the importance of the issues at stake in the
25 action, and the importance of the discovery in resolving the issues.” Fed. R. Civ. P. 26(b)(2)(C).

26 “The court may, for good cause, issue an order to protect a party or person from
27 annoyance, embarrassment, oppression, or undue burden or expense,” including by (1) prohibiting
28 disclosure or discovery; (2) conditioning disclosure or discovery on specified terms; (3)

1 preventing inquiry into certain matters; or (4) limiting the scope of disclosure or discovery to
2 certain matters. Fed. R. Civ. P. 26(c)(1). “Rule 26(c) confers broad discretion on the trial court to
3 decide when a protective order is appropriate and what degree of protection is required.” *Seattle*
4 *Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984).

5 DISCUSSION

6 Defendants contend they are entitled to enter the properties to conduct inspections based
7 on Plaintiffs’ damages claims for the loss or diminution in value of their properties. *Jt. Ltr.* at 2-3.
8 They maintain that any conditions at the properties that may not be in compliance with applicable
9 building code provisions “may well significantly affect Ms. Teeman’s opinions re valuation of the
10 properties.” *Id.* at 2.

11 Plaintiffs are willing to comply with Defendants’ request for an appraisal of the properties.
12 *Id.* at 4. However, they argue there is no need for a building inspector to accompany the appraiser.
13 *Id.* They maintain Defendants’ desire to have a building inspector present is an excuse “to find
14 any possible minor violation against one or both of the properties for the purpose of renewing their
15 campaign of harassment” against them. *Id.* Plaintiffs thus object to the entry of a County building
16 inspector on their properties as part of the appraisal. *Id.* at 5.

17 A. Relevancy

18 Pursuant to Rule 34(a), a party may serve a request “to permit entry onto designated land
19 or other property possessed or controlled by the responding party, so that the requesting party may
20 inspect, measure, survey, photograph, test, or sample the property or any designated object or
21 operation on it.” Fed. R. Civ. P. 34(a)(2). A party requesting inspection of property may seek an
22 order compelling such inspection when the requested party “fails to respond that inspection will be
23 permitted—or fails to permit inspection—as requested under Rule 34.” Fed. R. Civ. P.
24 37(a)(3)(B)(iv).

25 The party seeking to compel an inspection under Rule 34 has the initial burden of
26 establishing that its request satisfies the relevance requirements of Rule 26(b)(1). *Reece v. Basi*,
27 2014 WL 2565986, at *2 (E.D. Cal. June 6, 2014). “Following that showing (or if relevance is
28 plain from the face of the request), the party who resists discovery then has the burden to show

1 that discovery should not be allowed, and carries the ‘heavy burden of clarifying, explaining, and
2 supporting its objections.’” *Lenard v. Sherwin-Williams Co.*, 2015 WL 854752, at *1 (E.D. Cal.
3 Feb. 26, 2015) (quoting *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975)).

4 First, the Court finds Defendants have met their burden of demonstrating relevance.
5 Plaintiffs allege “not one shred of evidence ever existed to support the defendants’ ongoing
6 harassment of the plaintiffs,” yet “they nevertheless persisted in their allegations that the
7 Fratus[es] had violated land use restrictions in Contra Costa County.” Jt. Ltr. at 4. They allege
8 Defendants put them “through hell for many years during which time, their properties, which had
9 been purchased for investment purposes, were red-tagged and had notices of violation unlawfully
10 recorded against them,” and Plaintiffs “watched as the value of their properties plummeted -
11 unable to sell, refinance or make any useful purpose of their real estate.” *Id.* As Plaintiffs are
12 claiming diminution in value damages to their properties, and Defendants have shown the
13 condition of the residences on the properties is a relevant concern in the valuation determination,
14 the inspection request is valid and could lead to admissible evidence.

15 Second, Plaintiffs have failed to meet their heavy burden of showing the inspection should
16 not be allowed. Plaintiffs assert there is no evidence of any building code violations, and
17 Defendants are therefore entitled to determine whether this is true. As to Plaintiffs’ objection
18 regarding a County building inspector attending the inspection, they fail to provide any authority
19 establishing that a building inspector may not conduct an inspection pursuant to Rule 34(a)(2).
20 While Plaintiffs may likely disagree with Defendants’ completed report, they are free to present
21 their own contrary evidence to the jury.

22 Plaintiffs also argue “Defendants’ Request for Inspection on these residential properties by
23 a building inspector, if allowed, would operate as a ‘carte blanche’ walk around which as the court
24 pointed out in *U.S. v. American Optical Co.*, is not allowed under Fed. R. Civ. P. 34.” *Id.* at 5
25 (citing *United States v. Am. Optical Co.*, 2 F.R.D. 534, 536 (S.D.N.Y. 1942)). However,
26 *American Optical* does not address property inspections under Rule 34(a)(2), but instead addresses
27 limitations on the plaintiff’s request to search for documents. *Id.* There is no discussion regarding
28 a “carte blanche” walk around as part of a property inspection. The court held a Rule 34 document

1 designation “must be sufficiently precise in respect of each document or item of evidence sought
2 to enable the defendant to go to his files and, without difficulty, to pick the document or other item
3 requested out.” *Id.* For property inspections, a request under Rule 34(a)(2) is “sufficiently clear if
4 it places the party upon reasonable notice of what is called for and what is not.” *Thompson v.*
5 *Thather*, 2014 WL 1347493, at *2 (E.D. Cal. Apr. 3, 2014) (internal quotations and citations
6 omitted). Defendants’ Demand for Inspection puts Plaintiffs on notice of the County’s intent to
7 enter and inspect the properties at 2284 and 2300 Dutch Slough Road “for the purpose of
8 inspecting, measuring and photographing the property and any structures existing thereon,
9 including all areas within the residential structures, garages, and/or boat houses, or any other
10 structures and including interior spaces.” Jt. Ltr., Ex. A. The Court finds this demand is
11 sufficiently clear.

12 Accordingly, Defendants, through Ms. Teeman and their building inspector, are entitled
13 under Rule 34(a)(2) to enter the properties for the purpose of conducting inspections related to the
14 value of the properties.

15 **B. Protective Order**

16 Plaintiffs also request a protective order restricting the use of any information gleaned
17 from the inspection report for use only in this case. Jt. Ltr. at 5. Under Rule 26(c), courts have
18 discretion to issue protective orders provided that “good cause” exists to issue such an order to
19 protect a party from “annoyance, embarrassment, oppression, or undue burden or expense.”
20 Plaintiffs bear the burden of showing specific prejudice or harm will result if no protective order is
21 granted. *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992) (“broad
22 allegations of harm, unsubstantiated by specific examples or articulated reasoning, does not satisfy
23 the Rule 26(c) test”); *see also San Jose Mercury News, Inc. v. United States Dist. Ct.*, 187 F.3d
24 1096, 1102 (9th Cir. 1999) (to gain a protective order, the party must make a “particularized
25 showing of good cause with respect to any individual document”).

26 Inspections may be objected to on any basis that would support a Rule 26(c) protective
27 order. *McKesson Corp. v. Islamic Republic of Iran*, 185 F.R.D. 70, 76 (D.D.C. 1999) (citing
28 *Minn. Mining & Mfg. Co. v. Nippon Carbide Indus. Co.*, 171 F.R.D. 246, 248 (D. Minn. 1997)).

1 “When a responding party exercises this right and objects to a Rule 34(a) request, the court should
2 balance the degree to which the proposed inspection will aid in the search for truth against the
3 burdens and dangers created by the inspection.” *Id.* (citing *N.Y. State Assoc. for Retarded*
4 *Children, Inc. v. Carey*, 706 F.2d 956, 960 (2d Cir. 1983); *Belcher v. Bassett Furniture Indus.,*
5 *Inc.*, 588 F.2d 904, 908 (4th Cir. 1978); *Minn. Mining & Mfg. Co.*, 171 F.R.D. at 248)).

6 Plaintiffs seek a protective order to prevent Defendants from “renewing their campaign of
7 harassment” and reinstating code enforcement actions against them. Jt. Ltr. at 4. In response,
8 Defendants state the County “officially ceased” code enforcement actions against Plaintiffs in
9 2012 and “[t]hat is clearly not the intended purpose of the noticed inspections.” *Id.* at 3-4. In
10 balancing Defendants’ need for the inspection as part of its defense against the burdens created by
11 the inspection, the Court is mindful of the potential for an inspector with the County’s Building
12 Inspection Department to locate code violations that could be used to institute new code
13 enforcement actions. Although Defendants state they have ceased previous code enforcement
14 actions, they provide no affirmation regarding potential enforcement actions if any violations are
15 found as a result of the inspection. Thus, while it does not appear that Defendants’ inspection
16 request is designed to harass Plaintiffs, the Court finds it appropriate to limit information gained
17 from the inspection for use in this lawsuit.

18 **CONCLUSION**

19 Based on the analysis above, the Court **GRANTS** Defendants’ request to compel the
20 inspection, conducted by Ms. Teeman and an inspector with the County’s Building Inspection
21 Department, of 2284 and 2300 Dutch Slough Road. The Court also **GRANTS** Plaintiffs’ request
22 for a protective order, limiting the information obtained from the inspection to use in this lawsuit.

23 **IT IS SO ORDERED.**

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25 Dated: July 27, 2015

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28 MARIA-ELENA JAMES
United States Magistrate Judge