UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

GREGORY R. SCOTT and ROBERT L. COX,

Plaintiffs/Petitioners,

vs.

THE CITY OF SAN DIEGO and DOES 1-10 inclusive,

Defendants/Respondents.

CASE NO. 10-CV-699-H (NLS)

ORDER

(1) GRANTING MOTION TO DISMISS;

AND

(2) REMANDING THE CASE

On April 9, 2010, Defendant City of San Diego filed a motion to dismiss Plaintiffs' inverse condemnation and section 1983 claims. (Doc. No. 3.) On April 26, 2010, Plaintiffs filed their response in opposition to the motion to dismiss. (Doc. No. 4.) On May 3, 2010, Defendant filed its reply. (Doc. No. 5.) On May 4, 2010, the Court submitted this matter on the parties' papers. (Doc. No. 6.) For the following reasons, the Court now GRANTS Defendant's motion to dismiss Plaintiffs' inverse condemnation and section 1983 claims.

Background

On March 8, 2010, Plaintiffs Gregory R. Scott and Robert L. Cox filed a complaint against Defendant City of San Diego in the San Diego Superior Court, alleging causes of action for (1) writ of administrative mandate pursuant to California Code of Civil Procedure

section 1094.5; (2) inverse condemnation; (3) procedural due process under 42 U.S.C. § 1983. (Doc. No. 1, Ex. 1, Compl.) Plaintiffs allege that they are owners of the property located at 4304 Ridgeway Drive, San Diego, CA ("the Property"). (Compl. ¶ 5.) Plaintiffs allege that in 1995, they purchased the Property and built a patio, pool and spa area abutting the canyon on the Property. (Id.) Plaintiffs further allege that in July 2008, they hired a licensed contractor to build a fully permitted deck off their patio. (Id. ¶ 6.) Plaintiffs allege that on or about July 18, 2008, an inspector from the City of San Diego ("the City") visited the Property and delivered a "voluntary compliance" letter to Plaintiffs indicating that the deck was not properly permitted. (Id. ¶ 7.) Plaintiff allege that from that point on, all work on the project ceased immediately, and Plaintiffs fully cooperated and followed all instructions provided to them by the City. (Id. ¶ 12.) Plaintiffs allege that on September 5, 2008, Plaintiffs received a letter called "Notice of Violation and Order" (the "September Notice"). (Id.) The September Notice gave Plaintiffs two options: (1) to restore the site to its original condition, or (2) to develop the site in conformance with Municipal Code requirements. (Id.) Plaintiffs allege that they elected the second option, timely notified the City of their election, and arranged to obtain an erosion control plan ("ESP") as required by that option. (Id.) Plaintiffs allege that the ECP was implemented immediately after the City approved it on or about October 13, 2008. (Id.)

Plaintiffs allege that despite following the September Notice instructions, on November 6, 2008 Plaintiffs received a Notice of Violation and Order (the "November Notice"), which indicated that Plaintiffs failed to comply with the September Notice. (Id. ¶ 13.) The November Notice also informed Plaintiffs of the civil penalty hearing set for November 19, 2008. (Id.) Plaintiffs allege that at the November 19, 2008 hearing they discovered that they could be fined as much as $2500 per day for up to four months, not to exceed $250,000, and that the fine could be collected by placing a lien on their Property. (Id.) The civil penalty hearing was rescheduled to allow Plaintiffs to retain counsel. (Id.)

Plaintiffs allege that on December 3, 2009, after three days of hearings, an administrative hearing officer issued a Civil Penalties Administrative Enforcement Order,

finding that Plaintiffs violated the San Diego Municipal Code, and ordered Plaintiffs to pay $22,500 in penalties and an additional $2,532.45 in administrative costs. (Id. ¶ 8.) Plaintiffs allege that the hearing officer suspended $12,500 of the fines on condition that Plaintiffs submit restoration plans to remove deck and obtain a grading permit. (Id. ¶ 9.) Plaintiffs allege that at the civil penalty hearing the City informed Plaintiff's designer that Plaintiffs could not build a deck abutting the canyon on their property, and could not "play in, use or even spit in" the canyon property they own. (Id. ¶ 16.) Plaintiffs allege that on December 8, 2009, the City served Plaintiffs with the Civil Penalties Administrative Enforcement Order by letter. (Id. ¶ 17.) The Order informed Plaintiffs that they must seek a writ within 90 days of the date of the letter.

On March 8, 2010, Plaintiffs commenced this action. Plaintiffs allege that the Administrative Enforcement Order is not supported by the facts, findings or evidence, is unreasonable, and constitutes an abuse of discretion. (Compl. ¶ 11.) Plaintiffs allege that because the City selects trains, instructs and pays hearing officers, their decisions favor the City. Plaintiffs allege that the City's reliance on such hearing officers denies Plaintiffs and other property owners civil rights guaranteed by the U.S. and California Constitutions, specifically, the right to procedural due process. (Id. ¶ 36.) On April 2, 2010, Defendant City removed this action to federal court on the basis of federal question jurisdiction. (Doc. No. 1.) The City now moves to dismiss Plaintiff's procedural due process and inverse condemnation claims. (Doc. No. 3.)

Discussion

I. Motion to Dismiss - Legal Standard

A motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. Navarro v. Black, 250 F.3d 729, 732 (9th Cir. 2001). A complaint generally must satisfy only the minimal notice pleading requirements of Federal Rule of Civil Procedure 8(a)(2) to evade dismissal under a Rule 12(b)(6) motion. Porter v. Jones, 319 F.3d 483, 494 (9th Cir. 2003). Rule 8(a)(2) requires that a pleading stating a claim for relief contain "a short and plain statement of the claim showing

that the pleader is entitled to relief." The function of this pleading requirement is to "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. A complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (quoting id. at 557). "Factual allegations must be enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555 (citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235–36 (3d ed. 2004)). "All allegations of material fact are taken as true and construed in the light most favorable to plaintiff. However, conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." Epstein v. Wash. Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996); see also Twombly, 550 U.S. at 555.

II. Procedural Due Process

To state a § 1983 claim, Plaintiffs must allege facts that establish deprivations, by a person acting under color of state law, of rights, privileges or immunities secured by the Constitution. Butler v. Elle, 281 F.3d 1014, 1021 (9th Cir. 2002). Due process requires notice and an opportunity to be heard. G & G Fire Sprinklers, Inc. v. Bradshaw, 156 F.3d 893, 903 (9th Cir.1998). A due process claim under § 1983 is not cognizable when a state's post-deprivation remedies are adequate to protect a plaintiff's procedural due process rights. See Lake Nacimiento Ranch Co. v. County of San Luis Obispo, 841 F.2d 872, 878 (9th Cir.1987).

Defendant City moves to dismiss Plaintiffs' section 1983 procedural due process claim. The City argues that section 1983 claim is barred, because California state law offers an adequate remedy pursuant to a writ of mandate under California Code of Civil Procedure section 1094.5. (Doc. No. 3-1 at 10.) In their response in opposition, Plaintiffs do not address

the issue of whether their due process claim is cognizable or properly pled. Instead, Plaintiffs argue that the Court should abstain from exercising its jurisdiction over the case, because the "bulk of the claims" involve issues of state law. (Doc. No. 4 at 3-4.) Plaintiffs also ask the Court to postpone the ruling on Defendant's motion until Plaintiffs had sufficient time to seek remand to state court. (Id. at 4.) The Court concludes that Plaintiffs' due process claim under § 1983 is not cognizable, because a writ of administrative mandate under Cal. Code Civ. P. § 1094.5 is an adequate state law post-deprivation remedy available to Plaintiffs in order to determine whether Plaintiffs received a fair hearing. See Lake Nacimiento Ranch Co., 841 F.2d at 878. Accordingly, the Court GRANTS Defendant's motion to dismiss Plaintiffs' due process claim under section 1983.[1]

III. Inverse Condemnation

The Fifth Amendment guarantees that private property shall not "be taken for public use without just compensation." Agins v. Tiburon, 447 U.S. 255, 260 (1980). Although property may be regulated to a certain extent, "if regulation goes too far it will be recognized as a taking." First Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 316 (1987). A taking may be found without any physical invasion where "'a public entity acting in furtherance of a public project directly and substantially interferes with property rights and thereby significantly impairs the value of property....'" Martino v. Santa Clara Valley Water Dist., 703 F.2d 1141, 1147 (9th Cir. 1983) (quoting Richmond Elks' Hall Ass'n v. Richmond Redevelopment Agency, 561 F.2d 1327, 1330 (9th Cir.1977)). However, a regulation that adversely affects property values does not constitute a taking unless it destroys a major portion of the property's value. See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 496, 498 (1987). An essential prerequisite to asserting a regulatory takings claim is a "final and authoritative determination of the type and intensity of development legally permitted on the subject property." MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348 (1986). A takings claim is ripe when: (1) "the government entity charged with implementing

[1]The Court need not conclude as to whether Plaintiffs state a cognizable due process claim under state law.

the regulations has reached a final decision regarding the application of the regulations to the property at issue," and (2) the plaintiff "seek[s] compensation through the procedures the State has provided," unless doing so would be futile. Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 186-87 (1985). The final decision requirement ensures that a concrete case or controversy exists, as "[a] court cannot determine whether a regulation goes 'too far' unless it knows how far the regulation goes." Palazzolo v. Rhode Island, 533 U.S. 606, 621-22 (2001) (quoting MacDonald, Sommer & Frates, 477 U.S. at 348).

Defendant City moves to dismiss Plaintiffs' inverse condemnation claim on the basis that the claim is not ripe. (Doc. No. 3-1 at 6-7.) The City points out that Plaintiffs never applied for a development permit prior to construction of the deck, and the Civil Penalties Administrative Enforcement Order in this case did not involve a hearing regarding a denial of a site development permit. (Id. at 7.)

Here, Plaintiffs began construction of the deck in July 2008. (Compl. ¶ 6.) Plaintiffs do not allege that they applied for a development permit from the City prior to July 2008, or at any time leading up to this litigation. Without submitting an application for site development permit and receiving a denial of such application from the City, Plaintiffs cannot demonstrate that they received a final decision from the land use authority regarding application of the challenged land use regulation to its property. MacDonald, Sommer & Frates, 477 U.S. at 348. Accordingly, the Court concludes that Plaintiffs cannot state a cognizable claim for inverse condemnation under federal law,[2] and GRANTS Defendant's motion to dismiss Plaintiffs' inverse condemnation claim to the extent it relies on federal law.

IV. Subject Matter Jurisdiction over Plaintiffs' Complaint

After dismissal of Plaintiffs' section 1983 and inverse condemnation claims, there remains against Defendant a state claim for writ of administrative mandate under Cal. Code Civ. P. § 1094.5. A court may decline to exercise supplemental jurisdiction over state law claims if the district court has dismissed all claims over which it has original jurisdiction. 28 U.S.C. § 1367. "In the usual case in which all federal-law claims are eliminated before trial,

[2] The Court need not decide whether Plaintiffs can state their inverse condemnation claim under California law.

the balance of factors to be considered under the pendent jurisdiction doctrine--judicial economy, convenience, fairness, and comity–will point toward declining to exercise jurisdiction over the remaining state-law claims." United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966); Swett v. Schenk, 792 F.2d 1447, 1450 (9th Cir.1986) ("[I]t is within the district court's discretion, once the basis for removal jurisdiction is dropped, whether to hear the rest of the action or remand it to the state court from which it was removed."). Having dismissed Plaintiffs' federal question claims and finding no diversity jurisdiction in the complaint, the Court declines to exercise supplemental jurisdiction over Plaintiffs' remaining state law claim, and remands the case.

Conclusion

For the reasons above, the Court GRANTS Defendant's motion to dismiss Plaintiffs' inverse condemnation and section 1983 claims. The Court declines to exercise supplemental jurisdiction over Plaintiffs' state law claim, and remands the case to the Superior Court of the State of California for the County of San Diego.

IT IS SO ORDERED.

DATED: May 26, 2010

MARILYN L. HUFF, District Judge
UNITED STATES DISTRICT COURT