

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SHAWN THOMAS KALETA, an
individual, and BEACH TO BAY
CONSTRUCTION LLC, a Florida limited
liability company,

Plaintiffs,

v.

Case No. 8:16-cv-347-T-27AAS

CITY OF ANNA MARIA,

Defendant.

APPENDIX: FACTUAL BACKGROUND

Plaintiffs renovate properties and build new residences. (Kaleta deposition, Dkt. 74-3 at 58:15-59:21). Many of the new residences are large vacation homes owned or rented by nonresidents. *See (id.)*. Unlike most builders in the City, Plaintiffs own the majority of the real properties on which it builds. (*Id.* at 14:8-16, 116:2-11). They are among the most prolific builders in the City. *See (id.* at 115:4-11).

Anna Maria commissioners and the Mayor have expressed dissatisfaction with Plaintiffs' business practices. *See, e.g., (The Islander* Sept. 15, 2015 article, Dkt. 90-5) (Mayor stated "[Kaleta] needs to clean up his act."); (Exhibits to Carter deposition, Dkt. 90-8) (City Commissioner Carol Carter states in e-mail to other commissioners "[w]hat can we do? Drag our feet? Ask for more details? Scrutinize plans to the nth degree? Hire someone qualified to watch all the sites daily to see that any approved plans are followed exactly? I am sick at what this egotist has already done to our residential community. . . . I am petrified by the continuing and even more rapid decline in our resident/voter population in the City of Anna Maria."); (Exhibits to Webb deposition, Dkt. 90-9)

(City Commissioner Chuck Webb states in e-mail to other commissioners that they should “save” a cottage owned by Plaintiffs by enacting an ordinance.).

Plaintiffs claim that they engaged in protected speech by filing civil claims against the City in 2013 under the Bert J. Harris Private Property Rights Protection Act, FLA. STAT. § 70.001, (Kaleta deposition, Dkt. 74-3 at 52:12-19, 69:15-71:8),¹ and by their counsel commenting on their behalf at City Commission meetings, representing them before the City’s Planning and Zoning Commission, and corresponding with the City on their behalf, (Minutes of September 10, 2015 City Commission meeting, Dkt. 90-8); (Affidavit of Kaleta, Dkt. 90-10 at ¶ 4); (Correspondence dated Aug. 17, 2015, Dkt. 23-2). (Amended Complaint, Dkt. 23 at ¶ 92).

A. Plaintiffs’ Magnolia Avenue Construction Project

One of Plaintiffs’ projects was the construction of new buildings on five adjacent real properties at 209, 211, 213, 215, and 217 Magnolia Avenue. (Kaleta deposition, Dkt. 74-3 at 81:4-86:7). Plaintiffs applied for building permits for the five properties in July 2014. (Affidavit of Kaleta, Dkt. 90-10 at ¶ 3).

Kaleta testified that city employees Bob Welch and George McKay required Plaintiffs to install a chain link fence on the site before the City would issue building permits. (Kaleta deposition, Dkt. 74-3 at 81:4-83:12). He testified that Welch and McKay told him that the Mayor and the city commissioners instructed them to require the fence. (*Id.*). Kaleta averred that the City claimed to require the fence because “the development consisted of five or more properties,” (Affidavit of

¹ The Act provides: “[w]hen a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, the property owner of that real property is entitled to relief, which may include compensation for the actual loss to the fair market value of the real property caused by the action of government, as provided in this section.” FLA. STAT. § 70.001(2).

Kaleta, Dkt. 90-10 at ¶ 3), but asserts that the City did not require a chain link fence around a construction project on Villa Rosa Way that consisted of more than five lots, (Kaleta deposition, Dkt. 74-3 at 87:6-15). The City presents evidence that it required a fence around the Magnolia project because of its proximity to commercial properties and the amount of pedestrian traffic near the site, (Affidavit of McKay, Dkt. 75-3 at ¶¶ 3-4), and did not require a fence around the Villa Rosa project because it is residential only, *see* (July 10, 2017 Affidavit of Gibbs, Dkt. 75-2 at ¶ 4).

The City claimed that Plaintiffs damaged a City-owned rear alley drainage system during the Magnolia project, it had to repair the system, and Plaintiffs have not repaid it. *See* (Minutes of Sept. 10, 2015 City Commission meeting, Dkt. 90-8). Kaleta testified that Plaintiffs repaired any damage, but the City had contractors make more changes as part of a City-wide retrofit, and demanded that Plaintiffs pay for those changes as well. (Kaleta deposition, Dkt. 74-3 at 91:5-23).

The City issued temporary certificates of occupancy for 209 and 211 Magnolia Avenue, but did not issue a final certificate because of the dispute over the rear alley drainage system. (Correspondence, Dkt. 23-2). On August 17, 2015, Plaintiffs' counsel, who also represents third parties that own 209 and 211 Magnolia Avenue, sent a letter to the City demanding that the City issue a final certificate of occupancy, notwithstanding the dispute between the City and Plaintiffs. (*Id.*). At a September 15, 2015 meeting, the City Commission authorized the City attorney to take legal action against Plaintiffs over the rear alley drainage system. (Meeting Minutes, Dkt. 90-8). Plaintiffs' counsel attended that meeting and spoke on their behalf. (*Id.*).

B. Plaintiffs' 9802 Gulf Drive Property

Plaintiffs own property at 9802 Gulf Drive. (Kaleta deposition, Dkt. 74-3 at 98:10-22). On the property is a cottage built in the 1920s. (*Id.* at 98:10-16). Plaintiffs agreed to a ten year lease with

a third party tenant who initially used the property as a residence, but intended to convert it to commercial use. (*Id.* at 98:13-16, 99:2-21).

Plaintiffs obtained an electrical permit for 9802 Gulf Drive in February 2013 and completed all of the electrical work. (*Id.* at 99:22-100:11, 106:3-8). The tenant started some tiling work in summer 2015. (*Id.* at 109:3-8). On July 31, 2015, Building Official Jimmy Strickland issued a stop work (“red tag”) order. (Stop Work Order, Dkt. 23-3); (Strickland deposition, Dkt. 90-7 at 96:8-19). Kaleta testified that Strickland told him the Mayor directed him to red tag 9802 Gulf Drive, even though Plaintiffs had shown Strickland that there was no electrical work or other work requiring a permit occurring at the property. (Kaleta deposition, Dkt. 74-3 at 106:13-107:11).

In September 2015, the Mayor directed that power and water be cut off at 9802 Gulf Drive. (Murphy deposition, Dkt. 90-5 at 70:9-12).² Plaintiffs terminated the lease with their tenant because of the problems at the property. (Kaleta deposition, Dkt. 74-3 at 104:6-11). There is no evidence that the Mayor directed City employees to shut off the utilities at any other property subject to a stop work order. (Murphy deposition, Dkt. 90-5 at 70:21-25); *see also* (Strickland deposition, Dkt. 90-7 at 101:10-13) (“Typically we don’t turn the power off.”); (Agnelli deposition, Dkt. 74-1 at 66:3-6) (Another builder testifies that he has never had power shut off at his business’s properties even though several of his properties have received stop work orders.).

² Strickland testified that he does not recall the Mayor getting personally involved with 9802 Gulf Drive and that the Mayor did not order him to turn off power to the property. (Strickland deposition, Dkt. 90-7 at 99:1-12, 119:9-15). However, his testimony is contradicted by Kaleta and the Mayor’s testimony. (Kaleta deposition, Dkt. 74-3 at 106:13-107:11); (Murphy deposition, Dkt. 90-5 at 70:9-25); *see also* (*The Islander* Sept. 15, 2015 article, Dkt. 90-5) (“Murphy ordered the building department to contact Florida Power and Light and Manatee County utilities to cut off the building’s electricity and water.”). Because all facts must be viewed in Plaintiffs’ favor, it is assumed that the Mayor directed the red tag and utility shutoff at 9802 Gulf Drive. *See Scott v. Harris*, 550 U.S. 372, 380 (2007).

Kaleta testified that at some time after Strickland issued the stop work order at 9802 Gulf Drive, he told Strickland “I’ll just go ahead and demo it.” (Kaleta deposition, Dkt. 74-3 at 124:21-125:18). On September 27, 2015, City Commissioner Chuck Webb sent an e-mail to the other city commissioners stating that someone told him that he “stopped Kaletta [sic] from pulling permits in Anna Maria and would not allow construction on the [9802] Gulf property,” and that “[w]hile I am happy to take credit for this, the credit goes to the Mayor.” (Exhibits to Webb deposition, Dkt. 90-9). In the e-mail, Webb proposed “[I]ets [sic] see if we can save that cottage partially by tieing [sic] demo permits to building permits.” (*Id.*). In November 2015, the City Commission passed Ordinance No. 15-806, requiring that a demolition permit shall not be issued prior to approval of a building permit on the same lot or parcel. (*Id.*).³

Strickland also issued red tags to 209 and 211 Magnolia Avenue on August 10, 2015 for not obtaining a certificate of occupancy. (Stop Work Orders, Dkt. 23-3).⁴ Although third parties own those properties, the City had not issued a final certificate of occupancy as a result of its dispute with Plaintiffs regarding the drainage system restoration. (Correspondence, Dkt. 23-2); (Kaleta deposition, Dkt. 74-4 at 177:17-179:22); *see also* (Agnelli deposition, Dkt. 74-1 at 25:14-23, 28:3-22) (Another builder testified that builders know the City will not issue a final certificate of occupancy until they repair damage to City property caused by construction activity.).

³ Kaleta testified that the City Commission enacts a “Shawn Rule” whenever Plaintiffs engage in unwanted construction, such as prohibitions against tiki huts, water slides, and helicopter pads. (Kaleta deposition, Dkt. 74-3 at 43:17-45:19).

⁴ The evidence shows that the City also issued red tags to Plaintiffs’ properties located at 101 Willow, 230 Lakeview, 109 Pine, and 201 South Bay. (Kaleta deposition, Dkt. 74-4 at 171:4-175:21, 177:19-179:1-2, 179:9-16, 179:23-180:20, 181:21-182:22, 183:5-22, 189:16-190:22).

C. *The Mayor Publicly Stated that Plaintiffs Are Banned*

City Mayor Daniel Murphy publicly stated in September 2015 that the City was banning Plaintiffs from future building projects and from pulling permits, citing safety concerns. (*The Islander* Sept. 15, 2015 article, Dkt. 90-5); (Murphy deposition, Dkt. 90-5 at 10:10-13). The City provides evidence indicating that it has never denied Plaintiffs a permit, notwithstanding the Mayor's statements. (July 7, 2017 Affidavit of Gibbs, Dkt. 75-1). But Kaleta testified that City employees refused to accept permit applications from Plaintiffs or issue permits to them after the Mayor announced the ban. (Kaleta deposition, Dkt. 74-3 at 123:1-124:17, Dkt. 74-4 at 211:15-22). He averred that the City denied a permit in August 2015, and that the City's Planning and Zoning Commission affirmed the denial in November 2015. (Affidavit of Kaleta, Dkt. 90-10 at ¶ 4). Kaleta testified that the City lifted the ban a couple of months after the Mayor's statements and that Plaintiffs have since received permits. (Kaleta deposition, Dkt. 74-4 at 208:7-21). There is no evidence that the Mayor ever announced a ban on any other builder in the City, even those he acknowledges "tend to have more errors" than Plaintiffs. *See* (Murphy deposition, Dkt. 90-5 at 192:3-16); (Frank Agnelli deposition, Dkt. 74-1 at 65:25-66:2).

D. *Florida Department of Business and Professional Regulation and Department of Children and Families Complaints Against Kaleta*

Strickland filed a Department of Business and Professional Regulation complaint against Kaleta on September 16, 2015. (Dkt. 23-3). Although the DBPR complaint was filed only against Kaleta, the complaint affected Beach to Bay Construction because he is its licensed general contractor and sole owner. (Exhibits to Strickland deposition, Dkt. 90-7) (noting that "DBPR complaints could eventually result in Kaleta's Beach to Bay contracting firm losing the ability to serve as a certified contractor in Florida"). The evidence shows that the Mayor discussed filing a

DBPR complaint against Plaintiffs at a City Commission meeting, and that Strickland may have worked with the Mayor while drafting the complaint. (Minutes for Sept. 10, 2015 City Commission meeting, Dkt. 90-8) (“Mayor Murphy stated the City is beginning to document the contractor’s violations with the [DBPR].”); (Strickland deposition, Dkt. 90-7 at 119:16-3); (Murphy deposition, Dkt. 90-5 at 100:16-22). Murphy testified that the basis for the complaint was the City issuing three or four red tags to Plaintiffs’ properties. (Murphy deposition, Dkt. 90 at 100:16-22). A city employee has not filed a DBPR complaint against any other builder, even those who have received red tags at twelve or more properties. (*Id.* at 192:17-193:4); (Agnelli deposition, Dkt. 74-1 at 65:10-15).

Former city commissioner Christine Tollette made a complaint against Kaleta to the Department of Children and Families hotline after Commissioner Nancy Yetter called her and stated that she and Commissioner Carol Carter observed Kaleta leave children in a car while he voted on election day in 2016. (Tollette deposition, Dkt. 90-11 at 20:21-21:6). According to Tollette, Yetter and Carter knew that Tollette herself had been a victim of child abuse. (*Id.* at 23:1-2).

E. Plaintiffs Identify Frank Agnelli as a Builder Who is Similarly Situated to Them

There is at least one other builder, Frank Agnelli, whose company engages in a similar, if not larger, volume of construction projects in the City as Plaintiffs.⁵ He testified that his companies had three to four hundred projects within the City in the last ten years, he believes he is currently doing the most builds in the City, and he is pulling the most permits. (Agnelli deposition, Dkt. 74-1 at 10:21-23, 33:7-9, 69:15-21); *see also* (Kaleta deposition, Dkt. 74-3) (Kaleta testified that Agnelli

⁵ Plaintiffs also identify Daniel Gagne and Pete Dospel as builders who are identical to Plaintiffs. (Response, Dkt. 90 at p. 10). However, the evidence shows that they differ from Plaintiffs in material respects. (Gagne deposition, Dkt. 90-1 at 10:25-11:23) (Gagne testified that his company primarily builds single family residential homes for full time residents.); (Dospel deposition, Dkt. 74-2 at 16:3-17:13) (Dospel has only done approximately nine to thirteen total projects in the City of Anna Maria in the past five years.). Accordingly, there is no genuine dispute of material fact that Gagne and Dospel are not comparable to Plaintiffs.

may be the biggest builder in the City currently.); (Murphy deposition, Dkt. 90-5 at 190:7-13) (The Mayor testified that Kaleta and Agnelli are the two biggest builders in the City.).

The Mayor testified that Agnelli's "business model appears to be I'm the fastest and I'm the quickest and I get things done. So when you use that business model . . . you tend to have more errors." (Murphy deposition, Dkt. 90-5 at 192:3-16). The Mayor acknowledged that the City has issued twelve or more red tag orders to Agnelli and his properties. (*Id.* at 192:21-193:1); *see also* (Agnelli deposition, Dkt. 74-1 at 38:18-21) (identifying twelve specific red tags). And Agnelli believes he has been issued the most red tags of all builders in the City within the last five years, including ten or fifteen within the past year alone. (Agnelli deposition, Dkt. 74-1 at 24:18-20, 29:1-5). The City has never turned off power at any of his red tagged properties. (*Id.* at 66:3-6).