UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

ONEIDA SEVEN GENERATIONS CORPORATION and GREEN BAY RENEWABLE ENERGY, LLC,

Case No. 16-C-1700

Plaintiffs,

V.

CITY OF GREEN BAY.

Defendant.

AFFIDAVIT OF AMBER C. COISMAN IN SUPPORT OF THE PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

STATE OF WISCONSIN)

(SS COUNTY OF BROWN)

Amber C. Coisman, being first duly sworn on oath, deposes and states as follows:

- 1. I am an attorney with the law firm of Godfrey & Kahn, S.C. and one of the attorneys who represent the Plaintiffs, Oneida Seven Generations Corporation and Green Bay Renewable Energy, LLC in the above-entitled matter.
- 2. Attached hereto as **Exhibit A** is a true and accurate copy of *Europaper B.V. v. Integrated Material Management Serv., Inc.,* No. 01-211, 2003 WL 21688233 (N.D. Ill. July 17, 2003).
- 3. Attached hereto as **Exhibit B** is a true and accurate copy of *Peninsula Props., Inc. v. City of Sturgeon Bay*, No. 04-692, 2006 WL 1308093 (E.D. Wis. May 8, 2006).

- 4. Attached hereto as **Exhibit C** is a true and accurate copy of *CEnergy-Glenmore* Wind Farm #1, LLC v. Town of Glenmore, No. 12-1166, 2013 WL 3354511 (July 3, 2013), aff'd, 769 F.3d 485 (7th Cir. 2014).
- 5. Attached hereto as **Exhibit D** is a true and accurate copy of *Donohoo v. Hanson*, No. 14-309, 2015 WL 5177968 (W. D. Wis. Sept. 3, 2015).
- 6. Attached hereto as **Exhibit E** is a true and accurate copy of *Ecotone Farm, LLC v.*Ward, 639 Fed. App'x. 118 (3d Cir. 2016).
- 7. Attached hereto as **Exhibit F** is a true and accurate copy of *Three Legged Monkey LP v. City of El Paso*, No. 14-CV-00260, 2015 WL 12916439 (W.D. Tex. Jan. 8, 2015).
- 8. Attached hereto as **Exhibit G** is a true and accurate copy of *Sloup v. Loeffler*, No. 05-1766, 2008 WL 3978208 (E.D.N.Y. Aug. 21, 2008).

Dated this 28th day of February, 2017.

Amber C. Coisman

Amber C. Coisman

Subscribed and sworn to before me this 28th day of February, 2017.

<u>s/ Mary A. La Luzerne</u>

Notary Public, State of Wisconsin My commission expires: 11/05/17

EXHIBIT A

2003 WL 21688233

2003 WL 21688233
Only the Westlaw citation is currently available.
United States District Court,
N.D. Illinois, Eastern Division.

EUROPAPER B.V., Plaintiff,

v.

INTEGRATED MATERIAL MANAGMENT SERV., INC. and Peter Matsukis, Defendants.

No. 01 C 211. | July 17, 2003.

Memorandum Opinion and Order

HIBBLER, J.

*1 Plaintiff Europaper sued Integrated Material Management Services, Inc. (IMMS) and Peter Matsukis for breach of contract and fraud. Defendant Matsukis moves to dismiss the complaint arguing that Europaper lacks the capacity to sue and that Europaper is barred from suing by the Illinois Business Corporation Act. For the following reasons the court DENIES Defendant's motion to dismiss.

In October 2000, Europaper, a Dutch corporation, contracted to sell Illinois-based IMMS waste paper, presumably for IMMS to recycle. According to the contract, IMMS would pay Europaper \$106.50 per metric ton after Europaper transmitted a packing list notifying it that the waste paper had been loaded. Over the course of the next few months, Europaper claims that it sent IMMS 4,655.95 metric tons of waste paper in eight delivery installments and that IMMS accepted delivery of each shipment. After IMMS failed to make the necessary payments (but for two \$30,000 payments), Europaper sued IMMS and its sole stockholder, officer and director Matsukis.

Matsukis moves dismiss on two grounds. First, Matsukis alleges that Europaper lacks the capacity to sue. Europaper is a corporation with two shareholders, Abraham Reek and Elbert Papavoine, who together own 100% of the company. Europaper's by-laws require agreement from both shareholders to initiate any legal

action on Europaper's behalf. According to Matsukis, the suit only has the approval of Reek and in fact is ostensibly brought by Reek, who lacks the capacity to bring the suit. Second, Matsukis claims that Europaper barred from suing because it violated the Illinois Business Corporation Act by conducting business within Illinois without a Certificate of Authority.

Before addressing the merits of the Defendant's motion, the Court pauses to make clear the procedural posture of the case and the applicable standard of review. Matsukis raises his arguments regarding the capacity to sue and the Illinois Business Corporation Act on a motion to dismiss. In ruling on a motion to dismiss, the plaintiff's well-pleaded factual allegations must be taken as true and all reasonable inferences must be drawn in his favor. Lachmund v. ADM Investor Serv., Inc., 191 F.3d 777, 782 (7th Cir.1999). A motion to dismiss will be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Furthermore, a court should not look past the allegations contained within a complaint on a motion to dismiss and it is inappropriate to consider documents attached to a defendant's motion unless they are referred to in the plaintiff's complaint and are central to the plaintiff's claim. Menominee Indian Tribe of Wis. v. Thompson, 161 F.3d 449, 456 (7th Cir.1998); Wright v. Associated Ins. Cos., Inc., 29 F.3d 1244, 1248 (7th Cir.1994).

Matsukis first argues that the lawsuit "was initiated by a party without the capacity to do so." Matsukis claims that Reek filed the suit on Europaper's behalf without the consent of Europaper's other shareholder, Papavoine. In support of his claim, Matsukis attaches correspondence sent via facsimile, purportedly from Papavoine, stating that Reek did not have his approval to file the suit, as was required by Europaper's by-laws. It is true that capacity to sue must be raised in a responsive pleading or motion or it is waived. Swaim v. Moltan Co., 73 F.3d 711, 718 (7th Cir.1996); Wagner Furniture Interiors, Inc. v. Kemner's Georgetown Manor, Inc., 929 F.2d 343, 345 (1991). It is also true that a shareholder has no right to seek individual damages for injuries suffered by the corporation, Carney v. General Motors Corp., 23 F.3d 1154, 1157 (7th Cir.1994), or that a partner can not sue individually to recover damages for an injury to the 2003 WL 21688233

partnership, Creek v. Village of Westhaven, 80 F.3d 186, 191 (7th Cir.1996).

*2 But Matsukis's argument is not properly characterized as one challenging the Plaintiff's capacity to sue - Europaper, a corporation, clearly has the capacity to sue. Instead, the essence of Matsukis's argument is that the suit is not authorized by Europaper, that it does not want to sue, as evidenced by the purported facsimile sent to him by Papavoine. Matsukis's argument must fail. Nothing on the face of the complaint suggests that it is brought by Reek (as Matsukis contends) and not by Europaper. The complaint is signed by Joel F. Handler, Attorney for Europaper, thus representing that Europaper has authorized him to file this action and all subsequent pleadings on its behalf. Although Matsukis submits a letter purportedly from one of Europaper's shareholders suggesting that the suit does not have the full support of Europaper's shareholder's, as noted above, it is inappropriate for the Court to consider evidence (particularly unauthenticated evidence) outside of the pleadings in ruling on a motion to dismiss. There is a deeper problem undermining Matsukis's argument. Matsukis's argument is premised on his assertion of the rights of a third party, contrary to the general rule that a litigant must assert his own legal rights and interests. Powers v. Ohio, 499 U.S. 400, 410 (1991). The facsimile letter purportedly sent by Papavoine is telling. It reads: "Please find below a legal affidavid [sic] which you must present to the court as soon as possible on my behalf." The letter also instructs the Defendant's counsel to contact Matsukis "whom [sic] will also pay your charges on my behalf." But Europaper and Papavoine are capable of protecting their own interests and do not need Matsukis to champion them, especially since Matsukis is in an adversarial position. If Handler is acting contrary to Europaper's instructions and it does not consent to the suit, all it need do is retain new counsel and present its intent to the Court. Likewise, if Europaper is taking action that injures a shareholder (Papavoine) and is contrary to its by-laws, the injured shareholder can file a derivative suit on behalf of the corporation to enjoin it from taking such action or to recover damages. Matsukis goes so far as to suggest in his motion that Reek has been dismissed from his position as director of Europaper, making it more clear that Europaper does not consent to continuation of the suit. Far from making it clear that Europaper does not consent to the suit, it instead confirms that his argument is without merit. If, as Matsukis alleges, Reek was a

renegade director who brought this suit on behalf of the company for his own purposes and now no longer controls the company, why should Papavoine need to enlist the aid of counsel for Europaper's opponent now that Reek is out of the picture? If Papavoine truly wants the suit to be dismissed and Reek truly no longer controls the company, why hasn't the current director of Europaper informed its counsel to file a motion for voluntary dismissal? If Mr. Handler has refused to heed Europaper's instructions to voluntarily dismiss the suit, why hasn't Europaper retained new counsel to represent it? Matsukis invites this Court to accept the proposition that he can best represent the interests of his opponent. The Court declines this invitation. Should it later be revealed that Mr. Handler (Europaper's attorney) shirked his responsibility to make a reasonable inquiry into the dispute (of which he had knowledge) regarding Europaper's willingness to pursue its claim (or worse, ignored communication from his client directing him to dismiss the lawsuit), the Court will entertain a motion for Rule 11 sanctions against him.

*3 Matsukis offers a second reason why Europaper's suit should be dismissed: Europaper's failure to comply with the Illinois Business Corporation Act. The Act states that "[n]o foreign corporation transacting business in this state without a certificate of authority is permitted to maintain a civil action in any court of this state, until such corporation obtains a certificate of authority." 805 ILCS § 5/13.70. However, Illinois courts have held that a corporation engaged in only occasional and isolated transactions in Illinois is not required to obtain a certificate of authority. Subway Rest. Inc. v. Riggs, 696 N.E.2d 733, 737 (Ill.App.Ct.1998); Wenige-Epperson, Inc., v. Jet Lite Prods., Inc., 328 N.E.2d 665, 667 (Ill.App.Ct.1975); see also American Roofing Corp. v. Griffin Sales Co., No. 88 C 2252, 1988 WL 76943, *2 (N.D.Ill. July 15, 1988). There is no evidence that Europaper conducted any business in Illinois, other than shipping the eight installments of waste paper at issue in this case, which is insufficient to constitute "transacting business" in Illinois within the meaning of the IBCA. Cf. Subway Rest. Inc., 696 N.E.2d at 737 (ten transactions did constitute "doing business"). Matsukis bears the burden of proving that Europaper was transacting business in Illinois, and absent proof to the contrary it cannot be assumed that Europaper operated in violation of the statute. Mass Transfer Inc. v. Vincent Constr. Co., 585 N.E.2d 1286 (1992). Furthermore, Illinois courts have also held that the Commerce Clause of the United Europaper B.V. v. Integrated Material Management Serv., Inc., Not Reported in...

2003 WL 21688233

States Constitution prohibits Illinois from requiring that foreign corporations that "simply conduct[] interstate commerce," (though they have not addressed foreign commerce) obtain a certificate of authority. *Subway Rest., Inc.,* 696 N.E.2d at 737 (citing *Textile Fabrics Corp. v. Roundtree,* 233 N.E.2d 376 (1968)).

For the foregoing reasons, Matsukis's motion to dismiss is DENIED.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2003 WL 21688233

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EXHIBIT B

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF WISCONSIN

PENINSULA PROPERTIES, INC., et. al.

Plaintiffs,

V.

Case No. 04-C-692

CITY OF STURGEON BAY, et. al.

Defendants.

DECISION AND ORDER ON DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

On March 9, 2005, the defendants City of Sturgeon Bay and Waterfront Redevelopment Authority of the City of Sturgeon Bay ("defendants") filed a motion for judgment on the pleadings, seeking an order dismissing the 42 U.S.C. §1983 claims in the complaint of the plaintiffs Peninsula Properties, Inc., Lewis H. Krueger, Richard J. Giesler, and AAK Holdings, LLC., ("plaintiffs"). At the same time, a motion to dismiss was filed by the then defendant Guaranty Title Services, Inc. Subsequently, the plaintiffs and Guaranty Title Services entered into a stipulation for dismissal of Guaranty from this litigation, and the court signed an order to that effect. As a result, Guaranty's motion to dismiss is moot.

In their supporting brief, the defendants referred to facts outside of the pleadings, and the plaintiffs in response introduced declarations and exhibits in opposition to the motion. On April 6, 2005, the court conducted a status conference with counsel for the parties and it was agreed that the defendants' motion for judgment on the pleadings should be treated as a motion for summary

judgment since matters outside of the pleadings were relied on by the parties. An additional period of briefing was established in order to provide the parties with sufficient opportunity to treat the motion as one for summary judgment. All briefing has been completed and the motion is ready for resolution.

BACKGROUND FACTS

Peninsula Properties, Inc. and the individual plaintiffs are engaged in the business of developing commercial and residential properties. For ease of reference, since two predecessor companies were engaged in the initial stages of this development project and subsequently assigned their interest to Peninsula, the court will refer to the plaintiffs as such, or as "developers." In 1996, the City of Sturgeon Bay entered into a contract with the developers to construct a hotel and convention center and condominium units as part of a redevelopment project on a portion of the City's waterfront. The City acquired the site and then conveyed it to the developers and received a mortgage and mortgage note in return.

The Development Contract required completion of the "facility" within 15 months from the conveyance date. The contract contained a "time is of the essence" clause and a penalty provision for failure to complete on time. The contract further provided that in addition to the hotel/convention center, the developers would construct residential condominium units, three buildings each containing six units. The parties immediately encountered problems which resulted in delays. Each party has its own and opposite version of the cause for these delays and who was responsible. Needless to say, it is these contrary versions of what occurred that forms the basis of this litigation.

According to the plaintiffs, the City was not able to promptly acquire the project site and thus was not able to convey it to the developers until July 30, 1997. In addition to this delay, additional delays occurred when the parties decided to change the plans for the hotel/convention center. According to the developers, they advised the City administrator that these changes would be beneficial to the project, but would cause delay in the completion date. When the revised plans were ready, the developers applied for a building permit for the hotel/convention center which was issued on October 14, 1998. At the same time, the developers applied for building permits for the three residential buildings, but the City did not act on these.

The plaintiffs allege that the City, acting in response to the various delays, informed the developers that the City would not issue the residential building permits until the developers agreed to a compressed completion schedule for the three buildings. The plaintiffs state that because it was essential to obtain the building permits, the developers agreed to execute a final amendment to the 1996 contract. As required by the amendment of April 23, 1999, the developers completed construction of two residential buildings in 1999 and the third in 2000.

The developers then took steps to sell the various units. Each unit was, of course, subject to the terms of the 1997 mortgage that the developers gave to the City. Here, the plaintiffs allege that the City again attempted to use its power to change the terms of the agreement between the parties. The plaintiffs state that City refused to release each unit from the mortgage when the unit was sold, as had been the practice, unless the developers agreed to apply 75% of the proceeds of each unit's sale to reduction of the mortgage or to payment of contract subcontractors. When one of the original developers, DCI filed for bankruptcy, the City refused to issue any releases for condominium units sold. Peninsula claims that the City's refusal extended for a two year period, even though Peninsula

did not file for bankruptcy. Finally, the plaintiffs claim that the developers were forced to repay the mortgage debt early in order to facilitate the sale of the units.

As noted above, the City takes a much different view of what transpired. First of all, the City says that the 1996 contract is clear in its obligation for the developers to complete construction of the "facility" within 15 months from the date the property was conveyed. The City says that the contract defines the facility as including the hotel/convention center and 18 residential condominium units. This means that the entire project was to be completed by October 31, 1998 and "time was of the essence." The City says this requirement was important, because it wanted to obtain real estate tax revenue from the completed facility within the agreed upon time frame. The City acknowledges that there were some initial delays in acquiring the project site and modifications to the site. The City alleges that Peninsula threatened bankruptcy if it did not receive concessions and it had not provided a performance bond as required. The City then said that it would not issue building permits until the performance bond was posted and it declined the developers' request to waive this requirement. Finally, a performance bond was received for the hotel/convention center and a building permit issued for that structure, but a performance bond was not received for the condominium units. Consequently, the City would not issue building permits for the three residential units.

According to the City, all of the disputes between the parties were addressed in various amendments to the contract, the last (seventh and final) being the April, 1999, amendment. Pursuant to that amendment, Peninsula agreed to construct two of the three buildings by the end of 1999 and the third by the end of 2000. Peninsula then provided a performance bond for the residential units in August, 1999 and the City issued the building permits.

Apparently, the various amendments did not resolve all of the disputes between the parties, because there was still the issue regarding partial releases of the mortgage. The City states that it was providing partial releases of the mortgage upon sale of a unit, but when DCI filed for bankruptcy, the City's security in the property was "eroded" by each sale. The City then refused to issue any more releases until additional principal was paid or the debt fully satisfied.

The court will discuss additional facts in conjunction with its analysis of the plaintiffs's 42 U.S.C. §1983 claims.

SUMMARY JUDGMENT STANDARD

A motion for summary judgment will be granted when there are no genuine issues as to material fact and the movant is entitled to judgement as a matter of law. FED. R. CIV. P. 56(c). As provided under Rule 56(c), only "genuine" issues of "material" fact will defeat an otherwise "proper" motion for summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "[M]aterial facts are those facts which, under the governing substantive law, "might affect the outcome of the suit." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute of such material facts is "genuine" if the evidence is such that a reasonable trier of fact could find in favor of the nonmoving party. Id.

The movant bears the burden to establish that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 159 (1970); see also Celotex Corp., 477 U.S. at 323. The moving party satisfies its burden by demonstrating "that there is an absence of evidence to support the nonmoving party's case." Celotex Corp., 477 U.S. at 325. Any doubt as to the existence of a genuine issue for trial is resolved against the moving party. Anderson, 477 U.S. at 255; Cain v. Lane, 857 F.2d 1139, 1142 (7th

Cir. 1988); Spring v. Sheboygan Area School Dist., 865 F.2d 883, 886 (7th Cir. 1989). Further, "on summary judgment, a court can neither make a credibility determination nor choose between competing interests." Sarsha v. Sears, Roebuck & Co., 3 F.3d 1035, 1041 (7th Cir. 1993).

If the moving party meets its burden, the nonmoving party then has the burden to present specific facts showing that there is a genuine issue of material fact. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986).

SECTION 1983 CLAIMS ANALYSIS

In the complaint, the plaintiffs have raised several claims based on alleged violations of 42 U.S.C. §1983 that are being challenged by the defendants' motion for summary judgment. In Count 1 of the complaint, the plaintiffs allege that the defendant City of Sturgeon Bay used its municipal authority and improperly refused to issue building permits on the residential buildings in order to compel the developers to agree to a change in the construction deadlines. In Count 3 of the complaint, the plaintiffs allege that both defendants, the City and the Waterfront Redevelopment Authority arbitrarily refused to release their interest in the mortgage in regard to the sale of individual residential condominium units. The plaintiffs allege that the defendants' conduct was arbitrary and not related to any legitimate government interest and had the effect of denying the developers due process and equal protection of the laws. The complaint also raises state law contract and tort claims, which are not the subject of the defendants' motion, except to the extent that if the court grants the motion dismissing the § 1983 claims, the defendants urge that the state law claims be dismissed without prejudice, giving the plaintiffs an opportunity to pursue these in state court.

The position of the defendants is that, whatever disputes the plaintiffs have with the City and Waterfront Authority, they do not form the basis of "constitutional" violations, thus giving rise to

claims under §1983. At best, the plaintiffs have raised a number of claims that should be resolved by the state courts under the laws of contract. In support of their position, the defendants point to the contractual agreements between the parties, i.e. the January 26, 1996 Development Contract and its subsequent amendments and the July 30, 1997 mortgage and mortgage note. The defendants submit that all of the rights and obligations, including construction deadlines, between the parties are contained in these documents, and the City simply insisted on compliance by the developers. The City says that all of its actions were pursuant to contract and that a breach of contract claim is not a constitutional violation.

Addressing the specific alleged claims, the City contends that there is no constitutional right to the issuance of a building permit, so its alleged failure to issue same cannot constitute a violation of due process. Similarly, in regard to the alleged refusal to issue partial releases of the mortgage, the City says that it was acting pursuant to the language contained in the mortgage and mortgage note.

42 U.S.C. §1983 is the statutory vehicle for bringing actions in federal court for constitutional violations. It provides, in part,

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured

First, for §1983 to apply, a defendant must have acted "under color of law." For purposes of the defendants' motion for summary judgment, the court finds that this requirement has been satisfied. Second, the defendants' alleged conduct must have deprived the plaintiffs of rights, privileges or immunities secured by the Constitution. The constitutional rights the plaintiffs allege have been violated are the right to due process of law and the right to equal protection under the laws.

A. DUE PROCESS

A deprivation of property, as claimed by the plaintiffs, is actionable under §1983 when it occurs without due process of law. There are two types of due process violations: procedural and substantive. Procedural due process can occur when the process itself is lacking in fundamental procedural fairness, or in the exercise of authority without any legitimate governmental objective. Substantive due process protects against the exercise of arbitrary and oppressive government power. See, County of Sacramento v. Lewis, 523 U.S. 833, 845 (1998).

The complaint in this case does not specify which type of due process violations the plaintiffs are alleging, but it reads more like substantive. For example, paragraphs 23b and 41c allege that the defendants imposed "arbitrary" conditions on the plaintiffs. In their brief in opposition to the defendants' motion, the plaintiffs are clearly discussing substantive due process. Plaintiffs' Brief in Opposition at p.17. On the other hand, the defendants in their response/reply brief raise the issue of adequate state law remedies and the case of <u>Parratt v. Taylor</u>, 451 U.S. 527 (1981), both of which involve procedural due process. Defendants' Response/Reply Brief at pp. 20-21.

In the event the plaintiffs are alleging a procedural due process violation with respect to the defendants' conduct, the court will first address this issue. In regard to the City's failure to issue building permits, the plaintiffs are unable to establish a violation of procedural due process. This is because there are adequate state law remedies that a person aggrieved by an adverse decision regarding the issuance of a building permit can pursue. The state law remedies are pointed out by the defendants in their response/reply brief. (Def. Response/Reply Brief at p.20.). In accordance with the seminal case of <u>Parratt v. Taylor</u>, supra, and its progeny, procedural due process claims should be dismissed if adequate post-deprivation remedies exist under state law. A state post-deprivation remedy is

considered adequate unless it can be characterized as meaningless or non-existent. See <u>Easter House v. Felder</u>, 910 F.2d 1387, 1406 (7th Cir. 1990).

A recent example of this concept, although in a much different factual context, can be seen in the case of <u>Wall v. City of Brookfield</u>, 406 F.3d 458 (7th Cir. 2005), in which the City allegedly deprived the plaintiff of her property without due process of law. More particularly, the plaintiff alleged that the local humane society picked up her dog and detained it for sixty days, based on numerous violations of a municipal ordinance. In that case, the only process that the plaintiff could have obtained would have been a post-deprivation hearing since her dog was snatched off the street. However, since such a hearing was feasible under Wisconsin law, the Seventh Circuit cited <u>Parratt v. Taylor</u> for the proposition that "[n]o more process than that was constitutionally required." <u>Wall</u>, 406 F.3d at 460.

In the more applicable context of a denial of a building permit, the Seventh Circuit has also addressed the issue of the adequacy of the remedy. In New Burnham Prairie Homes v. Burnham, 910 F.2d 1474, 1480 (7th Cir. 1990), the plaintiffs alleged that the village unfairly hindered their development plans by denying building permits for impermissible reasons (racial animus). The lower court's dismissal of the plaintiffs' procedural due process claims on the ground that state law provided adequate post-deprivation procedures to remedy any wrong suffered by the plaintiffs was affirmed. Id. at 1480.

This means that, if adequate state law remedies are available after the alleged deprivation of personal or property rights to provide the process that is constitutionally due, there is no claim for a violation of procedural due process. Therefore, in this case, the claim that the City arbitrarily and improperly denied the issuance of building permits to the developers does not qualify as a violation

of the plaintiffs' procedural due process, because of the existence of adequate post-deprivation remedies.

Parenthetically, the plaintiffs cite the case of <u>Patsy v. Board of Regents of the State of Florida</u>, 457 U.S. 496 (1982), for the proposition that "exhaustion of state administrative remedies" is not a prerequisite to an action under § 1983. While that is a correct statement of law, it is inapposite to the present situation. The issue before the court is whether or not the plaintiffs have alleged a violation of due process. As discussed above, no procedural due process violation exists if there is adequate post-deprivation process. <u>Patsy</u> started from the premise that a constitutional violation was present, and addressed the question of whether state exhaustion was required before proceeding in federal court.

In regard to the refusal to issue releases of partial mortgages, the answer is not as clear. Here, the position of the City is that it was not acting under "color of state law," but was simply acting in the capacity of a mortgagee. Under the facts of this case, the court is not persuaded by the City's position. The mortgage is too intertwined with the construction project for the City to be viewed as only wearing a "mortgagee's hat" when it came time to issue partial releases. The City initially acquired the site in order to convey it to the developers, taking back a mortgage as security. Transactions in regard to the satisfaction of the mortgage were simply the last part of the continuum in the relationship between the defendants and the developers. The court will not permit the defendants to escape the plaintiffs' due process mortgage claim based on the absence of acting under color of law.

Returning to whether or not this claim can be considered as a violation of procedural due process, in light of the case law, the defendants have failed to indicate which remedies exist under

state law to provide due process. For example, is there a procedure the plaintiffs could have invoked to be heard on the refusal to issue partial releases? It may be, as noted in New Burnham Prairie
Homes, supra, that the developers could have resorted to state law mandamus procedures, but that was a case brought under Illinois law. Since this court declines to speculate as to possible post-deprivation remedies under Wisconsin law, the issue will be unresolved for the moment and the court will turn its attention to another due process violation - substantive due process. For if the plaintiffs are to support a §1983 due process violation for the City's refusal to issue the building permits, it will have to be under this theory.

The concept of substantive due process was discussed by the United States Supreme Court in the case of County of Sacramento v. Lewis, 523 U.S. 833 (1998), in which the parents of a motorcycle passenger killed in a high-speed police chase sued the county under §1983 alleging a deprivation of their son's substantive due process right to life. The Court stated that "the touchstone of due process is the protection of the individual against arbitrary action of the government." Id. at 845, citing Wolff v. McDonnell, 418 U.S. 539, 558 (1974). As stated earlier, a procedural due process guarantee protects against an arbitrary taking by the government, but the substantive due process guarantee protects against use of arbitrary and oppressive government power. Id. However, substantive due process only comes into play for "the most egregious official conduct [that] can be said to be 'arbitrary in the constitutional sense." Id. at 846 (citing Collins v. Harker Heights, 503 U.S. 115, 129 (1992)). For an abuse of executive power to reach a level that qualifies as a substantive due process violation, it must be such an abuse of power that "shocks the conscience." Id. Further, the County of Sacramento court cautioned that the "shock the conscience" standard is not one that will supplant traditional common law, and the substantive due process guarantee will not become a body of

constitutional law that imposes liability "whenever someone cloaked with state authority causes harm." <u>Id</u>. at 848.

Suffice it to say, most of the cases where the concept of substantive due process has been applied involve alleged violations of a person's constitutional rights, but the concept has been recognized in the context of property interests. See New Burnham Prairie Homes v. Village of Burnham, supra; Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461 (7th Cir. 1988). The Seventh Circuit has observed that the concept of substantive due process "is a difficult concept to pin down." Tun v. Whitticker, 398 F.3d 899, 902 (7th Cir. 2005). In fact, as the court commenced its discussion in that case, it commented as follows, "[t]his case requires that we once again wade into the murky waters of that most amorphous of constitutional doctrines, substantive due process." Id. at 900. This court will now wade into those murky waters.

B. SUBSTANTIVE DUE PROCESS ANALYSIS

1. Refusal to Issue Building Permits Claim

This court now turns to the facts of this case to determine whether or not the plaintiffs are able to sustain claims of substantive due process in regard to the refusal to issue building permits and the refusal to issue partial mortgage releases.

As briefly noted above, the parties' respective versions of what transpired in regard to this project is markedly different. Notwithstanding the different fact scenarios, the underlying position of the defendants is that all of the rights and obligations between the parties can be found in the 1996 contract and the seven amendments and the mortgage and mortgage note. The defendants submit that their actions were accordance with these unambiguous negotiated documents. While there seems to be a dispute as to whether the terms of these documents are as "unambiguous" as the defendants claim,

the crux of the plaintiffs' substantive due process claims center around the "negotiated" aspect of the documents.

While the plaintiffs in their reply brief take issue with many of the chronological "facts" set forth by the defendants in their response/reply brief, the basic scenario established by the plaintiffs is that the "negotiations" between the parties were actually an arbitrary exercise of the City's authority, to which the developers felt compelled to acquiesce. Basically, the plaintiffs contend that the City refused to issue building permits for the residential buildings unless the developers agreed to a new construction schedule. The plaintiffs allege that, as a result of the initial delays in acquiring the project site and the modifications in the design, the City and the developers had waived the "time is of the essence" requirement in the 1996 contract and the concomitant default remedies and had agreed upon a new schedule, one in which the construction of the second and third residential buildings would await consumer demand on the first. Then, despite this understanding, the City changed its position and arbitrarily used its power over the issuance of building permits to "force" the developers to agree to the various contractual amendments which established a deadline for the completion of all three buildings. The defendants submit that none of this evidence can be used because it violates the parol evidence rule. That is a rule to be applied under the law of contracts, but does not preclude the court from considering such evidence when assessing abuse of government power within the context of substantive due process.

In regard to the facts, the defendants, of course, present a scenario in which they attempted to deal with the developers' failure to comply with their contractual obligations by modifying the original contract through a number of amendments. When the developers failed to provide the required performance bond, the City felt its only recourse was to withhold issuance of the building

permits. In the alternative, the defendants respond that, even if the plaintiffs' allegations that the City acted improperly were given credence, the City's actions cannot be characterized as invidious or irrational. In other words, even if the City exercised poor judgment in refusing to issue building permits, its conduct does not rise to a violation of constitutional proportion. Comparing the defendants' position to the test for substantive due process, the question is whether, under the attendant circumstances, the defendants' conduct can be deemed to "shock the conscience."

As stated earlier, the scope of substantive due process is very limited and even more so when dealing with an alleged deprivation of property rights. As stated in Coniston Corp. v. Village of Hoffman Estates, "[n]o one thinks substantive due process should be interpreted so broadly as to protect landowners against erroneous zoning decisions." 844 F.2d at 466. Therefore, if a trier of facts found the defendants' version worthy of belief, it would appear that the defendants acted in the legitimate interests of the City and did not deprive the developers of their property rights by arbitrary or capricious action. Or, at the very worst, the defendants' conduct might be viewed as an exercise of poor judgment. But, there is a significant dispute over the material facts and when deciding a motion for summary judgment, the court must view the facts in the light most favorable to the party opposing the motion. Therefore, giving all reasonable inferences to the facts as presented by the plaintiffs, does the defendants' conduct shock the conscience?

This court believes that the plaintiffs have presented a viable case for a substantive due process violation. Under the factual scenario raised by the plaintiffs, it is simply not the refusal of the City to issue building permits, but the City's use of its authority in order to impose conditions upon the developers, conditions to which they did not want to agree and which harmed their financial and property interest in the project. In other words, this is not a situation where the government entity

failed to act because it exercised poor judgment, but it refused to act as a means to coerce a citizen to take unwarranted action. As alleged in the plaintiffs' version of the facts, this constitutes an abuse of authority which does shock the conscience. The court finds that the plaintiffs have stated a §1983 claim for a violation of substantive due process in regard to the failure to issue building permits, and it will deny the defendants' motion for summary judgment on this claim.

2. Refusal to Issue Partial Releases of Mortgage

In regard to the claim that the City refused to provide partial releases of the mortgage after the DCI bankruptcy, the defendants view this as a situation completely governed by the language of the mortgage. In particular, the defendants refer to a clause in the mortgage which states that the developers may not transfer, sell or convey "any legal or equitable interest in the Property . . . with the prior written consent of Mortgagee . . ." The defendants argue that they acted well within their contractual rights under the mortgage to withhold the further issuance of mortgage releases after DCI declared bankruptcy. This bankruptcy raised in the mind of the City a real concern with the financial viability of all of the developers. Certainly, the City contends, its actions in no way can approach the standard for a violation of substantive due process.

In response, the plaintiffs refer to paragraph 9a of the 1996 contract which provides that the developers may not "sell nor lease the entire hotel/convention center site or the premises without the prior written approval of the WRA, which shall not be unreasonably withheld." Paragraph 9a goes on to state, "[t]his subparagraph shall not require WRA approval for the sale or lease of any condominium unit or retail space." The plaintiffs argue that paragraph 9 of the 1996 contract thus acted as the "consent" required under the mortgage to convey an interest in the condominium units

and the practice prior to the DCI bankruptcy reflected this interpretation of the two documents by the parties.

As stated earlier, this court has rejected the defendants' argument that they were not acting under color of law when they refused to issue further partial releases of the mortgage. It is clear that this was part and parcel of the entire redevelopment project in which the City was certainly acting under color of law. That having been said, the arguments raised by the plaintiffs in both the initial brief in opposition to the defendants' motion and in the reply brief all sound in contract, rather than a violation of substantive due process. The plaintiffs first discuss interpretation of the two contract provisions under contract law, then evidence of the conduct of the parties in order to determine their intent, and finally, industry custom and practice.

In regard to a §1983 violation, the plaintiffs merely state that "§1983's protections extend to many breaches of contract." Plaintiffs' Brief in Opposition at p. 32. The plaintiffs submit that by refusing to issue partial releases of the mortgage, the defendants have deprived the developers of their rights in the 1996 contract, including their right to sell individual condominium units without restriction.

Even if a contract violation can deprive someone of property rights without due process of law, have the plaintiffs presented sufficient facts to sustain a claim under §1983 for a violation of substantive due process rights? Unlike the situation concerning the refusal to issue building permits, here the material facts are not really in dispute. The City does not disagree that it ceased issuing partial releases, but did so to protect its financial security in the project. The plaintiffs contend that Peninsula never filed for bankruptcy and that the City still had sufficient security in the project, but this goes more to the judgment exercised by the City than to conduct that "shocks the conscience."

In the court's opinion, nothing has been presented by the plaintiffs in response to the motion for summary judgment that reaches the threshold necessary to constitute arbitrary and capricious action. The court does not believe that a trier of fact could infer from the evidence presented that the City acted irrationally or that its actions would shock the conscience. Therefore, the court will grant the defendants' motion for summary judgment in regard to the plaintiffs' substantive due process claim in Count 3 of the complaint.

This, however, does not resolve the question of whether or not the plaintiffs are able to proceed on a claim of procedural due process in Count 3. Returning to the court's earlier discussion, the defendants have not shown that there were adequate post-deprivation remedies available to the developers when the City refused to issue partial releases. If adequate state law remedies were available, then there is no procedural due process violation; if not, the plaintiffs will be able to proceed on this claim.

At this juncture, all the court is able to do is to deny the defendants' motion for summary judgment on the claim of procedural due process without prejudice.

C. EQUAL PROTECTION ANALYSIS

Both Counts 1 and 3 of the complaint allege a §1983 cause of action based on a denial of equal protection of the law. See paragraphs 23c and 41d. Although the defendants' motion for summary judgment seeks dismissal of the plaintiffs' § 1983 claims, neither party discusses the equal protection aspect of these claims.

A person bringing an action under the Equal Protection Clause of the Constitution must establish that he was discriminated against because of his membership in a particular class. See

<u>Huebschen v. Department of Health and Social Services</u>, 716 F.2d 1167, 1171 (7th Cir. 1983). Within the context of a denial of a building permit, the court in New Burnham Prairie Homes, supra, stated,

In order to assert a constitutional claim based on violation of equal protection, a complaining party must assert disparate treatment based on their membership in a particular group. Discrimination based merely on *individual*, rather than group, reasons will not suffice.

910 F.2d at 1481.

In that case, the court rejected the plaintiffs' equal protection claim, because they were unable to show that they had been singled out for denial of the building permits on the basis that they belonged to a particular class.

The single allegation in the complaint that touches on the denial of equal protection argument is that the City has never imposed similar conditions "on similarly situated persons" Paragraphs 23c and 41d. This certainly fails to raise discrimination based on group membership. No facts are presented in opposition to the motion to summary judgment that would raise the inference that the developers were singled out for the alleged conduct because of their membership in a particular group.

The plaintiffs have failed to present any facts to support a violation of equal protection of the law, and in this regard, the defendants' motion for summary judgment will be granted.

SUMMARY

The court will grant the defendants' motion for summary judgment on the following claims: plaintiffs' §1983 claim for violation of procedural due process under Count 1, failure to issue building permits; plaintiffs' claim for violation of substantive due process under Count 3, failure to issue partial releases of the mortgage; and plaintiffs' claims for violation of equal protection of the law under both Counts 1 and 3.

The court will deny the defendants' motion for summary judgment on the following claims:

plaintiffs' claim for violation of substantive due process under Count 1, failure to issue building

permits; and plaintiffs' claim for violation of procedural due process under Count 3, failure to issue

partial releases of the mortgage. The latter is denied without prejudice.

Since the motion did not deal with the state law claims contained in the complaint, they

remain.

IT IS THEREFORE ORDERED that the defendants' motion for summary judgment is

granted as to the following claims:

1. Plaintiffs' §1983 claim for violation of procedural due process under Count 1, for failure

to issue building permits;

2. Plaintiffs' claim for violation of substantive due process under Count 3, for failure to issue

partial releases of the mortgage; and

3. Plaintiffs' claims for violation of equal protection of the law under both Counts 1 and 3.

IT IS FURTHER ORDERED that the defendants' motion for summary judgment is denied

as to plaintiffs' claim for violation of substantive due process under Count 1, for failure to issue

building permits.

IT IS FURTHER ORDERED that the defendants' motion for summary judgment is denied

without prejudice as to plaintiffs' claim for violation of procedural due process under Count 3, for

failure to issue partial releases of the mortgage.

Dated at Milwaukee, Wisconsin this 16th day of August, 2005.

s/AARON E. GOODSTEIN

United States Magistrate Judge

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EXHIBIT C

2013 WL 3354511 Only the Westlaw citation is currently available. United States District Court, E.D. Wisconsin.

CENERGY-GLENMORE
WIND FARM # 1, LLC, Plaintiff,
v.

TOWN OF GLENMORE, Defendant.

No. 12–C–1166. | July 3, 2013.

Attorneys and Law Firms

Joseph R. Cincotta, Law Offices of Joseph R. Cincotta, Milwaukee, WI, for Plaintiff.

Remzy D. Bitar, William E. Keeler, III, Crivello Carlson SC, Milwaukee, WI, for Defendant.

DECISION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

WILLIAM C. GRIESBACH, Chief Judge.

*1 Plaintiff CEnergy-Glenmore Wind Farm # 1, LLC (CEnergy) filed this action against Defendant Town of Glenmore under 42 U.S.C. § 1983 alleging that the Town violated its right to substantive due process when it unreasonably delayed issuance of the building permits CEnergy needed to construct seven wind turbines. As a result of the delay, CEnergy lost a lucrative longterm contract with the power company that was going to purchase the energy its wind turbines would have generated. CEnergy's complaint also asserts a state law claim against the Town for a breach of duty of good faith and fair dealing. The case is before the court on the Town's motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. More specifically, the Town contends that CEnergy's due process claim is not ripe for review because CEnergy either has or had state law remedies which it failed to exhaust. At the court's invitation, the parties also addressed the question of whether the complaint states a substantive due process claim. For the reasons stated in this opinion, the Town's motion will be granted.

FACTS

The allegations of the complaint, which are accepted as true for purposes of deciding a motion to dismiss, Transit Express, Inc. v. Ettinger, 246 F.3d 1018, 1023 (7th Cir.2001), provide the factual basis for the court's analysis. According to the complaint, a company called Prelude, LLC, the assets of which CEnergy later purchased, contracted with Dennis and Mary Zirbel and Michael and Sandra Zirbel (the Zirbels) to build wind turbines on land they own in the Town of Glenmore, located south of Green Bay. The Zirbels assigned Prelude the property rights it needed for the purpose of developing the project. (Compl.¶ 11.) Prelude obtained a conditional use permit (CUP) from the Town on September 10, 2007, which allowed for the development of seven wind turbines on the Zirbels' property. (¶ 12.) After obtaining the CUP, Prelude executed a Power Purchase Agreement (PPA) with Wisconsin Public Service Corp (WPS) on August 5, 2009. Under the PPA, WPS was obligated to purchase power generated by Prelude's wind turbines at a predetermined rate for a 20 year period. As a condition of the PPA, Prelude was required to obtain all required local permits to build the turbines on the Zirbels' property by March 1, 2011. (¶ 12, 17, 18.) It wasn't until August 2010, however, that Prelude was informed that the Town required separate building permits for each of the wind turbines authorized under the CUP. (¶ 20.) By that time or shortly thereafter, significant community opposition to the project had apparently developed, and the Town decided to stall issuance of the required building permits. $(\P\P 23-25.)$

The complaint details Prelude's efforts to obtain the required building permits for the project. Prelude first attempted to apply for a building permit in September 2010; however, representatives from the Town advised Prelude that an application could not be accepted until the Town received more information about the development project. Prelude attempted to comply with Town's request for additional information, but between September and December 2010, the Town continuously refused to accept or consider Prelude's application for a building permit. On December 14, 2010, Town Clerk Lana Ossman sent a letter to Prelude at the direction of Town Attorney Robert Gagan requesting additional information from Prelude. CEnergy, which by that time was in the process of

purchasing Prelude's assets, including its rights in the wind turbine project, responded to Ossman's letter supplying the additional requested information and addressing other issues the Town had raised by December 31, 2010. According to the complaint, by the end of December, the Town had all the information it needed to issue the building permits. (¶ 24–35.)

*2 Also by December 2010, CEnergy and Prelude had informed the Town that it was essential that the permits be issued before March 1, 2011, or the PPA with WPS would become unenforceable. Mark Dick, a representative of CEnergy, explained to Town Board Chair Don Kittel, Attorney Gagan, and Ossman that the building permits were needed by March 1, 2011, in order for its PPA to be enforceable. Dick also explained that without the PPA, under which WPS agreed to pay for the energy generated by the turbines at set rates, the wind farm project would not be feasible in light of changes in the energy market. In other words, the Town knew that if the building permits were not granted by March 1, 2011, the project would very likely founder. (¶¶ 29–31.)

CEnergy contacted the Town to ensure that the consideration of its application for the building permits would be considered at its next Board meeting in January 2011. At the January 2011 meeting, Attorney Gagan advised the Board and first disclosed to CEnergy that he could not comment on the information supplied by CEnergy and would need additional time to review it. Members of the town also attended the meeting and "created a clamor and loudly opposed the project." (Id. ¶ 39.) Representatives from CEnergy and Prelude contacted the Town's representatives in order to inquire how the building permits could be obtained within the necessary time frame. CEnergy and Prelude also requested that Glenmore hold a special meeting, but these requests were denied. The Town reassured CEnergy that the issue of the building permits would be taken up in January or February. In addition, the Town did not request any additional information concerning the permits. (\P 44–47.)

The issue of the building permits was not put on the agenda for the Town's February meeting. Instead, the Town informed CEnergy that Attorney Gagan still had not had time to review the information submitted. Again, members of the town appeared at the February meeting and loudly voiced their opposition to the wind farm project. The complaint describes the citizens who appeared at the Town meetings as "a mob" and alleges that they instilled a climate of concern and fear within the members of the Board and other town officials. (*Id.* ¶ 46.) Also during this period, Don Kittel received numerous threats to his physical safety should he approve the wind farm project. Neither CEnergy nor Prelude knew about these threats. Although the issue of the building permits was not raised in February, CEnergy continued to request special meetings before the March 1st deadline. These requests were also rebuffed. CEnergy alleges that at "this point in February 2011 there was no decision by the Town on the issue or the building permits and thus no legal claims to enforce the building permits, or force the grant or issuance of those permits, were available to CEnergy and were not ripe at that time." (*Id.* ¶ 47.)

On March 1, 2011, the Town finally allowed CEnergy to submit its application for the building permits and held a public meeting on March 7 to take up the issue of the permits. The Board stated that CEnergy had supplied all the necessary information to obtain a permit. The Board initially voted to grant CEnergy's permit and adjourned the meeting. After its vote the town citizens in attendance became visibly angry and threatening, necessitating security to be contacted to control the crowd. The Board then re-opened the meeting, engaged in further discussion about the permits, and voted to rescind its decision granting the permits. (¶¶ 49–54.) Later a special meeting was held on March 16, 2011, where the Board voted to retract its earlier rescission of its decision to grant the permits. The end result was that CEnergy was granted the necessary building permits it needed to develop the wind farm project, but it was too late. WPS sent a letter to CEnergy on March 4, 2011, terminating the PPA due to CEnergy's failure to obtain the necessary building permits by the March 1st deadline. (¶¶ 58-60.)

*3 CEnergy attempted to sell its rights in the wind farm project to another power company and, together with that company, attempted to convince WPS to honor the PPA in spite of the failure of the condition precedent or to renegotiate a new PPA. These efforts were not fruitful. (¶¶ 66–67.) In addition, even after the building permits were granted, the Town's building inspector informed CEnergy that he was forbidden from issuing the permits by Attorney Gagan. Attorney Gagan sent a letter to CEnergy that it was required to satisfy additional criteria before the permits could be issued. According to the complaint, Board Chair Kittel later stated to CEnergy

representative Dick that the Town acted "improperly and without a basis to thwart CEnergy's project and that he was manipulated by the Town attorney and clerk to take actions to intentionally delay and deny consideration and issuance of building permits to CEnergy knowing that doing so would cause CEnergy to lose the project." (*Id.* ¶ 71.) CEnergy asserts that as a result of the Town's actions, it lost approximately \$7,000,000 in profit that it would have generated under its contract with WPS. (*Id.* ¶ 17.)

DISCUSSION

As noted above, the Town's motion seeks dismissal of CEnergy's substantive due process claim for lack of subject matter jurisdiction pursuant Rule 12(b)(1) on the ground that CEnergy's federal claim is not ripe for review. The Town's argument is predicated on Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, which held that a claim by a landowner that a local government has either directly or indirectly taken his property without paying just compensation is not ripe until the landowner has first used the available state procedures for seeking just compensation. 473 U.S. 172, 195 (1985); see also Gamble v. Eau Claire County, 5 F.3d 285, 286 (7th Cir.1993) ("[A] landowner cannot complain that his constitutional right [to just compensation for a taking] has been denied until he exhausts his remedies for obtaining a compensation award or equivalent relief from the state."). Here, the Town argues, CEnergy's constitutional claim is not ripe because it failed to exhaust available state court remedies. The fact that CEnergy has labeled its claim as a substantive due process claim makes no difference, the Town contends, because "[l]abels do not matter. A person contending that state or local regulation of the use of land has gone overboard must repair to state court." River Park v. City of Highland Park, 23 F.3d 164,167 (7th Cir.1994); see also Forseth v. Village of Sussex, 199 F.3d 363, 370 (7th Cir. 2000) (affirming district court's dismissal of landowner's substantive due process claim against Village for lack of jurisdiction for failure to pursue state court remedies). Based on Williamson, the Town contends, CEnergy's due process claim is not ripe and must therefore be dismissed.

It seems doubtful that lack of ripeness is the problem with CEnergy's claim. Ripeness, as the name implies, addresses "whether a dispute has yet matured to the point that warrants decision." 13B Wright, Miller & Cooper,

FEDERAL PRACTICE AND PROCEDURE § 3532, at 365 (2008). "Ripeness concerns may arise when a case involves uncertain or contingent events that may not occur as anticipated, or not occur at all." Wisconsin Right to Life State Political Action Committee v. Barland, 664 F.3d 139, 148 (7th Cir.2011). "The basic rationale of the ripeness doctrine 'is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 200 (1983) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967)). "[T]he question of ripeness turns on the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Id. at 201 (internal quotations omitted). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." Texas v. United States, 523 U.S. 296, 300 (1998) (internal quotations omitted).

*4 In this case it is clear that CEnergy's substantive due process claim does not rest upon contingent future events that may not occur as anticipated or at all. As a result of the Town's delay in issuing building permits for the wind turbines, CEnergy's lucrative contract with WPS, has been terminated. CEnergy's rights in the agreement have been lost. There is no state or local remedy available to CEnergy that it can use to recover its investment in the project or the profits it anticipated it would have received had the building permits been granted before March 1, 2011. CEnergy's claim is as ripe as it will ever be. What remains is the broader question the court asked the parties to address: namely, has CEnergy stated a substantive due process claim in the first place?

The law governing substantive due process remains confused. See Tun v. Whitticker, 398 F.3d 899, 900 (7th Cir.2005) ("This case requires that we once again wade into the murky waters of that most amorphous of constitutional doctrines, substantive due process.). Though on its face, the Due Process Clause would seem to apply only to the "process," in particular the procedural protections, that a person must be afforded before government can deprive him or her of "life, liberty or property," U.S. Const., Amdt. XIV, § 1, the

Supreme Court has long held that the Clause "cover[s] a substantive sphere as well, 'barring certain government actions regardless of the fairness of the procedures used to implement them.' "County of Sacramento v. Lewis, 523 U.S. 833, 840 (1998) (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)). However, substantive due process claims are "limited to violations of fundamental rights." Palka v. Shelton, 623 F.3d 447, 453 (7th Cir.2010). This is because, "[a]s a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992).

In County of Sacramento v. Lewis, the Court held that "the substantive component of the Due Process Clause is violated by executive action only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.' "523 U.S. at 847. Although the Seventh Circuit has described Lewis's "shocks the conscience" standard as "not a very illuminating expression," Slade v. Board of School Directors of City of Milwaukee, 702 F.3d 1027, 1033 (7th Cir.2012), it has applied the test to land use disputes such as this.

In Bettendorf v. St. Croix County, the court applied the shocks-the-conscience test in affirming the district court's dismissal of a landowner's substantive due process claim against the County for rescinding the commercial zoning designation of a portion of his property. 631 F.3d 421 (7th Cir.2011). In that case, the County had previously passed an ordinance re-zoning the property from agriculturalresidential to commercial. The ordinance contained a condition, however, that upon the transfer of the property by the owner, or his death, the classification would revert to agricultural-residential. *Id.* at 423. The landowner sued in state court seeking a declaration that the condition was void. The circuit court found in the landowner's favor, but the Wisconsin Court of Appeals reversed, holding that the entire ordinance was void which caused the classification to revert to agricultural-residential. When the County rescinded the zoning ordinance in compliance with the court's judgment, the landowner commenced a federal action alleging an unconstitutional taking and violation of procedural and substantive due process. In affirming the district court's summary judgment dismissing the landowner's substantive due process claim, the court noted that "[a] government entity must have exercised its power without reasonable justification in a manner that 'shocks the conscience' in order for a plaintiff to recover on substantive due process grounds." *Id.* at 426 (citing *Tun*, 398 F.3d at 902). It concluded that, given the state court of appeals ruling, the "County's decision to revoke the commercial designation [could] hardly be considered conscious-shocking or arbitrary." *Id.*

*5 The Third Circuit reached a similar conclusion applying the shocks-the-conscience test to a land used dispute in Eichenlaub v. Township of Indiana, 385 F.3d 274 (3d Cir.2004). There officials were alleged to have applied subdivision requirements to the plaintiffs' property that were not applied to other parcels, pursued unannounced and unnecessary inspection and enforcement actions, delayed certain permits and approvals, improperly increased tax assessments, and maligned and muzzled the plaintiffs. Id. at 286. Noting that the complaints were typical of the kind of disagreement that is frequent in planning disputes and that there was no allegation of corruption or self-dealing, the court affirmed the district court's conclusion that the "misconduct alleged here does not rise sufficiently above that at issue in a normal zoning dispute to pass the 'shocks the conscience test.' " Id.

Applying the shocks-the-conscience test here, CEnergy's claim fails. As in *Eichenlaub*, there is no allegation of corruption or self-dealing by the members of the Town Board. There is no allegation that the Board was bribed or that the members had a financial interest in killing CEnergy's contract. The Town's failure to act, according to the complaint, was motivated by community opposition to the wind farm development. It is hardly surprising, or shocking, that an elected Town Board would be responsive to its more vocal constituents. If inaction and delay on the part of government officers and representatives is enough to shock the judicial conscience, the sea of substantive due process claims would flood the courts beyond what even the most vociferous proponents of substantive due process could imagine.

The Seventh Circuit has also held in land use disputes that substantive due process violations may arise where a substantive constitutional right has been violated and state remedies are inadequate. *See Centres, Inc. v. Town of Brookfield,* 148 F.3d 699, 704 (7th Cir.1998) ("The case law of this circuit makes clear that, in order to state a substantive due process claim, a plaintiff must also allege that some other substantive constitutional right has been violated or that state remedies are inadequate." (citing

New Burnham Prairie Homes, Inc. v. Village of Burnham, 910 F.2d 1474, 1481 (7th Cir.1990); Polenz v. Parrott, 883 F.2d 551, 558–59 (7th Cir.1989); Kauth v. Hartford Ins. Co., 852 F.2d 951, 958 (7th Cir.1988)). Though it seems more akin to procedural due process, this standard, like the shocks-the-conscience test, is also intended to "impose substantial burdens on the plaintiff" so as to prevent federal courts from becoming "zoning boards of appeal." Id. (quoting Polenz, 883 F.2d at 558); see also United Artists Theatre Circuit, Inc. v. Township of Warrington, 316 F.3d 392, 402 (3d Cir.2003) (noting that "[a]pplication of the 'shocks the conscience' standard in this context also prevents us from being cast in the role of a 'zoning board of appeals.' "(citing Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir.1982)).

*6 CEnergy argues under this test that the Town's motion to dismiss should be denied because it has "no state law remedies available to it that would come close to achieving recovery of the several million dollars it lost in upfront investment and future profits." (ECF No. 14, at 8.) If the Town were a private actor, CEnergy contends, it would be able to sue in state court for tortious interference with its contract with WPS. CEnergy notes, however, that the Town is immune from such liability under state statute. (ECF No. 14 at 9 (citing Wis. Stat. § 893.80(4)).) Certiorari review pursuant to state law would not provide an adequate remedy, CEnergy contends, because at best it could only result in an order granting it a new hearing. And since the Town ultimately granted its application for the building permits, CEnergy contends, it has no basis for seeking certiorari. More importantly, CEnergy notes, it could not recover damages in an action for certiorari. The same is true of mandamus. Quoting Menzel v. City of Milwaukee, 32 Wis.2d 266, 277, 145 N.W.2d 198 (1966), CEnergy notes that mandamus cannot be used to compel action "when the officer's duty is not clear and unequivocal and requires the exercise of the officer's discretion." (ECF No. 14 at 13.) And like certiorari, mandamus is not a remedy for recovery of damages. Despite the blunt language of *River Park*, CEnergy notes, no Seventh Circuit case holds that a landowner may not bring his claim to federal court if he has no adequate state law remedies "for compensation or equivalent relief." (Id. at 9.) Because it has no available remedy here, CEnergy argues that this case is similar to Polenz v. Parrott.

In *Polenz*, the plaintiffs successfully sued an alderman and electrical inspector under § 1983 for allegedly depriving

them of their right to a fair hearing on their applications for a tayern license and causing them to be arbitrarily and unreasonably denied an occupancy permit for their property. On appeal, the Seventh Circuit held that the plaintiffs had no constitutionally protected liberty or property interest in a liquor license and reversed that portion of the trial court's judgment awarding damages attributable to that part of the claim. 883 F.3d at 554 56. As to the balance of their claim, the court found that the plaintiffs did have a property interest in an occupancy permit based on their undisputed claim that they were unable to occupy their premises for any purpose for a period of almost two years as a result of the defendants' conduct. Id. at 557. Moreover, the defendants had not appealed the jury's finding that the denial of the occupancy permit was arbitrary and unreasonable. Id. at 558. But that was not enough to establish a violation of substantive due process. To prevail on a substantive due process claim in the context of land use regulations, the court held, "in addition to showing that the decision was arbitrary and irrational, the plaintiff must also show either a separate constitutional violation or the inadequacy of state law remedies." Id. at 558-59 (citing Kauth v. Hartford Insurance Co., 852 F.2d 951, 956-58 (7th Cir.1988)). Because there had been no determination by the trial court as to the adequacy of the state remedies. the court remanded this aspect of the case for further proceedings. Id. at 559. Thus, as CEnergy views the law, its substantive due process claim survives. A jury could find that the actions of the Town Board in delaying issuance of a building permit were arbitrary and capricious and, because there is no state law remedy that it could use to recover its investment and lost profits, it may sue the Town for a violation of its right to substantive due process.

*7 But the question is not whether CEnergy *now* has available state remedies that would allow it to recover the value of its investment and the profits it lost as a result of the cancellation of its contract. The question is whether there were state remedies that were available before CEnergy suffered its loss:

The cases hold that the federal claim is unripe until state remedies are exhausted. But a claimant cannot be permitted to let the time for seeking a state remedy pass without doing anything to obtain it and then proceed in federal court on the basis that no state remedies are open.

As recognized in other areas where exhaustion of remedies is required, an unexcused failure to exhaust forfeits the plaintiff's rights, with various exceptions not applicable here.

Gamble, 5 F.3d at 286.

Here, it is clear that there were state remedies available to CEnergy before the deadline expired under its contract with WPS. Under the Town's Zoning Ordinance, applications for building permits were required to be made in writing to the Town Zoning Administrator. Town of Glenmore Zoning Ordinance, § 24, ¶ E(2). (ECF No. 20–1, at 8.) The provision states: "The Zoning Administrator shall issue the building permit if the proposed building complies with all of the provisions of this ordinance." *Id.* In an apparent attempt to avoid unreasonable delays, the ordinance further states:

The building permit shall be granted or denied within a ten (10) day period from the date the application is received by the Zoning Administrator. The failure of the Zoning Administrator to issue a permit within said ten day period shall be construed as a denial of the building permit, thereby beginning the tolling [sic] of the thirty (30) day period in which the applicant can appeal to the Board of Appeals for the issuance of said building permit.

Id.

Prelude, CEnergy's predecessor, obtained the CUP allowing it to develop the wind farm on September 10, 2007, and it entered into the PPA with WPS requiring that it obtain all necessary permits by March 1, 2011, on August 5, 2009. At any time thereafter, CEnergy could have simply filed its application for a building permit with the Zoning Administrator and, if the Zoning Administrator failed to issue it within ten days, appeal the deemed denial to the Board of Appeals. Under the Zoning Ordinance, the failure of the Board of Appeals to issue a decision within sixty days was also deemed a denial. *Id.* ¶ C(10) (ECF No. 20–1 at 7.) At that point, assuming neither the Zoning Administrator nor the Board

of Appeals had acted, CEnergy could have filed an action for a writ of mandamus in state court. See Lake Bluff Housing Partners v. City of South Milwaukee, 197 Wis.2d 157, 540 N.W.2d 189 (1995) (noting that mandamus is available to compel municipality to issue building permit where proposed construction and application for permit are in full compliance with zoning and building code).

CEnergy alleges in its complaint that it was not advised it would need a building permit until August of 2010. (Compl.¶ 20.) Of course, ignorance of the law does not excuse a failure to comply with procedural requirements. *Albino v. Baca*, 697 F.3d 1023, 1036–37 (9th Cir.2012); *see also Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir.1999) ("[I]gnorance of the law, even for an incarcerated *pro se* petitioner, generally does not excuse prompt filing."). But even if the fact that CEnergy, or its predecessor, did not know it needed a building permit was an excuse, there was still sufficient time for recourse to state law remedies when Prelude learned of the requirement for a building permit in August 2010.

*8 CEnergy also alleges in conclusory fashion that the Town refused to allow Prelude to apply for a building permit. (Compl. ¶ 21-24.) But the Town's Zoning Ordinance does not require an applicant to get the Town's approval before applying for a building permit. It simply says that applications for building permits are to be made in writing to the Zoning Administrator by the landowner or his/her authorized agent. (ECF No. 20-1 at 8.) CEnergy does not claim that it attempted to file an application with the Zoning Administrator and he refused to accept it. At oral argument, counsel conceded that in fact CEnergy had adopted a cooperative approach with the Town in the belief that this offered it the best opportunity to meet its deadline. The decision to adopt such an approach may have been reasonable, but the fact that it failed does not mean CEnergy had no state law remedy available to obtain the relief to which it claims it was entitled.

If CEnergy, or Prelude, had forced the issue and applied for a permit immediately after it received the CUP, or at least when it became apparent that the political winds were changing direction, it may have gotten a state court to compel the Town to issue its permits and avoided the loss for which it now seeks compensation. The fact that it might not have succeeded in time for CEnergy to meet its contractual deadline anyhow is of no moment.

Due process requires only a state court remedy, not a guaranteed win by the applicant's contractual deadline. The Court's conclusion in *River Park* is equally applicable here:

Illinois provided River Park with ample means to contest the runaround it was receiving at the hands of Highland Park. If because the City refused to make a formal decision the standard means were cut off, the common law writ of certiorari remained. The opportunity to apply for that writ is enough, we have held, even when rights under the first amendment are at stake. Graff v. Chicago, 9 F.3d 1309, 1323–25 (7th Cir.1993) (en banc). It is assuredly enough in a zoning case. River Park insists that state law entitled it to an R4 zoning; if that is so, state litigation would have fully protected its rights. Instead of asking for relief from the state courts, River Park went along with the political process until it was too late. It lost the political fight. Federal litigation is not a repêchage round for losers of earlier contests, or for those who overslept and missed the starters' gun.

23 F.3d at 167. It thus follows that the Town's motion to dismiss should be granted. CEnergy lost whatever rights it may have had in this matter by failing to pursue its state judicial remedies. *Gamble*, 5 F.3d at 288. It has no substantive due process claim.

CONCLUSION

In sum, whether one applies *Lewis*' shocks-the-conscience test or *Polenz*' absence-of-state-remedies test, the result is the same. CEnergy's complaint fails to state a substantive due process claim. Absent a federal claim, the usual and preferred course is to dismiss the supplemental state law claims without prejudice, especially when there has been almost no discovery or pretrial proceedings. *Van Harken v. City of Chicago*, 103 F.3d 1346, 1354 (7th Cir.1997). Accordingly and for the reasons set forth above, the Town's motion to dismiss is granted. CEnergy's substantive due process claim is dismissed with prejudice, and the state law claims are dismissed without prejudice. The Clerk is directed to enter judgment in favor of the Town and against CEnergy forthwith.

*9 SO ORDERED.

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EXHIBIT D

2015 WL 5177968

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> Barry DONOHOO, Plaintiff, v. Doug HANSON et al., Defendants.

> > No. 14-cv-309-wmc | Signed Sept. 3, 2015.

Attorneys and Law Firms

Barry Richard Donohoo, Solon Springs, WI, for Plaintiff.

Andrew P. Smith, Phillips Borowski, S.C., Rhinelander, WI, for Defendants.

OPINION and ORDER

WILLIAM M. CONLEY, District Judge.

*1 This lawsuit arises out of a relatively common dispute in Wisconsin between county officials and a landowner seeking a land use permit to construct an addition to his lakefront home. The difference here being that the landowner, who was dissatisfied with the process afforded him in state court, now hopes to make a federal case out of it.

The Constitution does, of course, provide protection to property owners. However, any constitutional challenge to a local land use decision must be considered in light of the principle that "zoning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative authorities." *Green Valley Investments v. Winnebago Cnty., Wis.*, 794 F.3d 864 (7th Cir. July 27, 2015) (quoting Warth v. Seldin, 422 U.S. 490, 508 n. 18 (1975)). For this reason, property owners dissatisfied with a local land use decision generally must appeal to local land use agencies or state court for relief. "[F]ederal courts, as we have explained time and again, are not zoning boards of appeal." Miller v. City of Monona, 784 1113. 1119 (7th Cir.2015) CEnergy-Glenmore Wind Farm # 1, LLC v. Town of

Glenmore, 769 F.3d 485, 487 (7th Cir.2014) (collecting cases)).

That being said, there are three constitutional protections frequently invoked by federal plaintiffs challenging land use decisions: the Fifth Amendment Takings Clause; the Fourteenth Amendment Equal Protection Clause; and the Fourteenth Amendment Due Process Clause. The Takings Clause, which applies to states via the Due Process Clause of the Fourteenth Amendment, says that private property may not be "taken for public use, without just compensation." U.S. Const. amend. V. The Due Process Clause, in turn, says that states may not "deprive any person of ... property, without due process of law." U.S. Const. amend. XIV. The Equal Protection clause prohibits states from denying "to any person within its jurisdiction the equal protection of the laws." Id. Pro se plaintiff Barry Donohoo appears to invoke all three of these constitutional protections in his complaint.

Local officials in Douglas County, Wisconsin, denied Donohoo's permit request on the grounds that his proposal exceeded County zoning limitations on construction of shoreland property. Believing that the County's shoreland zoning ordinances conflicted with a recently enacted state law, Donohoo then appealed the denial of his permit to the County Board of Adjustment, and when the Board upheld the denial, he filed a petition for writ of certiorari in state circuit court. While his certiorari case was pending, however, the County amended its shoreland zoning ordinances and issued a land use permit to Donohoo. Nonetheless, he filed this federal lawsuit, contending that the initial denial of his permit request, as well as subsequent related actions taken by County officials, violated his constitutional rights.

*2 Now before the court is defendants' motion for summary judgment (dkt. # 27), as well as Donohoo's motion for leave to amend his complaint (dkt.# 61). After reviewing the parties' legal arguments, proposed findings of fact and evidence in the record, defendants' motion will be granted as a matter of law under Fed.R.Civ.P. 56(a), the undisputed facts and governing law confirming that Donohoo cannot prove any federal constitutional claim against the defendants.

UNDISPUTED FACTS²

I. The Parties

Plaintiff Barry R. Donohoo lives on Lake of the Woods in the Town of Solon Springs, an unincorporated area in

Douglas County, Wisconsin. Defendants are all county employees. Doug Hanson is the appointed Chair of the Douglas County Board of Adjustment; Roger Wilson, Dale Johnson and Larry Luostari are appointed members of the Board of Adjustment; Steven Rannenberg is the Douglas County Planning and Zoning Administrator; Carolyn Pierce is corporation counsel; and Susan T. Sandvick is the county clerk.

II. Donohoo Seeks a Building Permit to Expand His Home.

On May 25, 2015, Donohoo filed a land use permit application and mitigation plan with the Douglas County Planning and Zoning office to construct a small addition to his home.³ Donohoo had intentionally limited his construction proposal in order to comply with the Douglas County shoreland zoning ordinances, which placed numerous restrictions on building and development located in the unincorporated shoreland areas of the County.

Shortly after filing his permit application, however, Donohoo learned that a state law, 2011 Wisconsin Act 170 ("Act 170"), had been passed on April 17, 2012, restricting local authorities from enacting shoreland zoning ordinances for "nonconforming structures" that were more restrictive than those passed by the Wisconsin Department of Natural Resources ("WDNR"). Believing that the new state law applied to his home and trumped the County's shoreland zoning ordinances, Donohoo notified the County Zoning and Planning office that he was withdrawing his permit application and mitigation plan. On May 30, 2012, he submitted a revised permit application in which he proposed a significantly greater addition to his home. In particular, he proposed to add a second story to the entire principal structure on his property, effectively increasing its area by 100%.

III. Rannenberg Denies Donohoo's Permit Request and the Board of Adjustment Rejects His Appeal.

As the County Planning and Zoning administrator, Rannenberg was responsible for reviewing and either approving or denying Donohoo's permit application. While Rannenberg was unsure how to respond given an apparent conflict between county ordinances and state law, the parties agree that at the time Donohoo filed his revised permit application, his proposal violated the existing County shoreland zoning ordinances. The ordinances limited expansion of a lakeshore home such as Donohoo's to 50% by area, as well as imposed specific mitigation requirements, unless preempted by then

recently enacted Act 170, although even before its enactment, the most recent WDNR shoreland zoning regulations were less restrictive than those imposed by the County. *See* Wis. Admin. Code § NR 115. In short, at the time it was initially before him, Rannenberg was uncertain whether Donohoo's revised application violated any or all of the County's shoreland zoning ordinances, WDNR regulations or Act 170.

*3 Accordingly, Rannenberg reached out to the WDNR Shoreland Policy Coordinator, Heidi Kennedy, for guidance on how the WDNR interpreted the changes created by Act 170. See Rannenberg Aff., dkt. # 36, Exhs. E, G. Kennedy responded that WDNR legal counsel had opined that, although Act 170 no longer permitted Douglas County to have more restrictive shoreland zoning ordinances than those contained in WDNR regulations, Douglas County's limitation on area expansion was not prohibited by Act 170 and the County could maintain its requirement for a mitigation plan. Rannenberg subsequently denied Donohoo's land use permit application on the grounds that it did not comply with the County's shoreland zoning ordinance. See Rannenberg Aff., dkt. # 36, Exh. F (June 7, 2012 letter to Donohoo explaining reasons for permit denial).

On June 22, 2012, Donohoo appealed the denial to the Douglas County Board of Adjustment. The Board addressed Donohoo's appeal at a hearing on July 25, 2012. At the hearing, Rannenberg testified that he rejected Donohoo's permit because it was contrary to County shoreland zoning ordinances and that, based on Rannenberg's communications with WDNR, he did not believe that Act 170 trumped those ordinances. Donohoo then argued that Act 170 trumped the County's shoreland zoning ordinance.' After hearing from Donohoo, the Board members asked questions of both Rannenberg and Donohoo. Ultimately, the Board upheld the denial of Donohoo's permit application.

IV. Donohoo Files a Petition for a Writ of Certiorari in State Court, Douglas County Amends Its Zoning Ordinances, and Donohoo Receives a Permit.

On August 24, 2012, Donohoo brought a certiorari action in Douglas County Circuit Court challenging the Board's decision to uphold the denial of his permit application. *Donohoo v. Douglas County Board of Adjustment*, 2012CV306 (Dougl.Cnty.Cir.Ct.). As the Douglas County clerk, Sandvick was responsible for submitting the record of the Board's decision to the circuit court for review. For reasons that are unclear from the record, Sandvick did not submit the record of the Board's decision to the circuit court until March 7, 2013. *See* Sandvick Dep. at 14–15,

Dkt. # 43. That record consisted of the minutes, exhibits and agenda of the July 25 meeting. Additionally, although the Board's July 25 hearing had been recorded, Sandvick did not submit the audio recording to the circuit court on the ground that it had been compromised by a technical failure.⁵

On December 20, 2012, before the circuit court had addressed the merits of Donohoo's certiorari petition, the County amended its shoreland zoning ordinances to conform with Act 170 and WDNR's regulations. The following day, on December 21, Rannenberg notified Donohoo that, under the newly enacted ordinances, Rannenberg could issue Donohoo's requested land use permit, subject to approval of a mitigation plan by the County Land and Water Conservation Department and payment of a \$250 fee in conjunction with the mitigation plan. Although it is not entirely clear from the record, disagreements about mitigation requirements seem to have further stalled the issuance of Donohoo's land use permit for several more months. The permit was, however, finally issued on May 31, 2013.6

*4 Neither side explains what happened with Donohoo's certiorari action between the time it was filed and the time Donohoo received his permit, but Wisconsin's online court records indicate that Donohoo's certiorari action was ultimately dismissed on January 23, 2014. Perhaps because Donohoo had received a permit from the County before the state circuit court was ready to issue a decision, it also appears that the merits of Donohoo's petition were never decided. The court did, however, issue a decision denying Donohoo's request for fees under Wis. Stat. § 59.694(14), concluding that Donohoo could only obtain fees by proving that the Board acted in "bad faith." Dkt. # 56 (circuit court decision on fees). The court further found that there was no evidence that the Board acted with "gross negligence, in bad faith or with malice" in denying Donohoo's administrative appeal. Id. Instead, the court held that although the record showed that the Board may have "misinterpreted the newly enacted state law when it relied upon the advice of its Zoning Administrator and the DNR," the Board did not act in bad faith. Id.

Donohoo did not appeal the circuit court's decision, nor did he file any further lawsuits in state court challenging the land use permit he eventually received.

V. Permits Issued to Other Landowners.

After the December 20, 2012, amendments to the Douglas County Zoning Code, two other landowners with property located on Lake of the Woods sought land use permits proposing vertical expansion of structures, similar to the

project proposed by Donohoo. In both instances, mitigation plans were required of and implemented by the property owners. *See* Rannenberg Aff., dkt. # 36, at 111154–55.

OPINION

Donohoo alleges in his complaint that his constitutional rights to due process, equal protection and the use and enjoyment of his property were violated when: (a) Rannenberg denied his land use permit in June of 2012; (b) the Board upheld denial of the permit at the hearing on July 25, 2012; (c) the County failed to promptly provide the full record to the circuit court in response to his certiorari action; and (d) the County conditioned his eventual permit on mitigation requirements that were contrary to 2011 Wisconsin Act 170 and more onerous than those imposed on other landowners. Defendants have moved for summary judgment on all of Donohoo's claims, contending that none of the actions about which he complains amount to denial of a constitutional right. Because Donohoo has failed to make a viable legal argument or point the court to legitimate material factual disputes in this record, defendants' motion will be granted in its entirety.

I. Preliminary Matters

At the outset, it is worth noting that Donohoo's brief in opposition to defendants' motion (dkt.# 54), fails to provide any meaningful response to the legal arguments defendants raised in their brief in support of summary judgment. To the contrary, his entire brief is less than four pages long and contains no discussion of the law applicable to his claims. Further, although he contends that there are factual disputes, he makes no attempt to explain how those purported disputes are *relevant* to any of the constitutional claims he has raised. Indeed, Donohoo fails to address the elements of his constitutional claims at all.

*5 Generally, the failure to provide any meaningfully opposition to an argument operates as waiver. Wojitas v. Capital Guardian Trust Co., 477 F.3d 924, 926 (7th Cir.2014); Cincinnati Insurance Co. v. Eastern Atlantic Insurance Co., 260 F.3d 742, 747 (7th Cir.2001). Moreover, although Donohoo is entitled to some leeway as a pro se litigant, he has demonstrated throughout this case that he is a capable litigator. He ably deposed several of the defendants, filed coherent responses to defendants' proposed findings of fact, and submitted numerous

documents and other evidence. Donohoo also appears to have had the advice and assistance of his father, who is an attorney, throughout this litigation.

In light of all this, the most reasonable explanation for Donohoo's failure to respond to defendants' legal arguments is that he could find no legal authority that would support any counter-arguments. Indeed, although defendants' motion for summary judgment could be granted based solely on Donohoo's failure to respond to any of defendants' legal arguments, the court will briefly address the merits of his constitutional claims if for no other reason than to attempt to demonstrate to Donohoo's satisfaction that his claims are foreclosed by well-established law, fully realizing that this may prove a fool's errand.

II. Takings Claim.

The Takings Clause generally entitles a landowner to just compensation if a state or one of its subdivisions "takes" the owner's land, although a regulation (such as a zoning ordinance) or a land use decision (such as rejection of a building permit) that prevents the owner from deriving any economic value from the land is actionable as a taking. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). Accordingly, Donohoo cannot prove that any decisions by the Douglas County defendants amounted to a taking of his property. Certainly, Donohoo does not claim that the County actually took land from him, and a regulatory taking occurs only where "the challenged government action deprive[s] a landowner of all or substantially all practical uses of the property." Bettendorf v. St. Croix Cnty., 631 F.3d 421, 424 (7th Cir.2011) (citation omitted). Since the record facts show that Donohoo has maintained a house on his property for years, he has not been deprived of "all or substantially all practical uses of the property."

Even if Donohoo could show that a "taking" had occurred as a result of the denial of his initial permit request or the restrictions placed on the permit, he could not maintain a takings claim. The right protected by the Takings Clause is merely to the market value of what was taken. Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 190 n. 11, 194–95 (1985) ("The Fifth Amendment does not proscribe the taking of property; it proscribes the taking of property without just compensation."). This means Donohoo cannot bring a claim that his constitutional right to compensation has been denied until he exhausts his remedies for obtaining a compensation award or equivalent relief from the County. Id. ("[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot

claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."). Until then, he cannot know whether he has suffered the type of harm for which the Takings Clause affords a remedy. *Flying J Inc. v. City of New Haven*, 549 F.3d 538, 543 (7th Cir.2008).

*6 Because Donohoo failed to pursue available state remedies, he cannot bring a takings claim in federal court. Donohoo sought judicial review of the decision by the Board of Adjustment, but he failed to appeal the circuit court's decision dismissing his certiorari action. Additionally, Donohoo could have brought a suit for inverse condemnation under Wisconsin statutory law or the state Constitution. See Wis. Stat. § 32.10; Wis. Const. art. I, § 13. Accordingly, his takings claim is not ripe and must be dismissed. See Forseth v. Vill. of Sussex, 199 F.3d 363, 373 (7th Cir.2000) (dismissing takings claim for plaintiff's failure to exhaust state court remedies); River Park, Inc. v. City of Highland Park, 23 F. 3d 164, 165 (7th Cir.1994) ("Litigants who neglect or disdain their state remedies are out of court, period.").

III. Equal Protection Claim.

Donohoo next claims that the defendants' actions violated his equal protection rights. There are some limited situations in which a property owner may be able to raise a successful equal protection challenge to a local land use decision. See, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 448-50 (1985) (requirement that group home for persons with disabilities obtain a special permit violated equal protection clause). However, the Seventh Circuit has cautioned plaintiffs that they cannot dodge the exhaustion requirement of Williamson County by recasting a takings claim as a claim under the Equal Protection Clause. Muscarello v. Ogle Cnty. Bd. of Comm'rs. 610 F.3d 416, 423 (7th Cir.2010) ("Any equal protection claim based on a taking would be unripe and subject to all of the objections that we have just reviewed in connection with the takings claim."); Patel v. City of Chicago, 383 F.3d 569, 573-74 (7th Cir.2004) ("The Plaintiffs insist that [the Williamson County ripeness requirements] do not [apply] because theirs is an equal protection claim, not a takings claim [but] we conclude that the Plaintiffs' have merely re-labeled their takings claim as an equal protection claim, presumably to avoid Williamson County's ripeness requirement."); River Park, 23 F.3d at 167 ("Labels do not matter. A person contending that state or local regulation of the use of land has gone overboard must repair to state court.").

Here, Donohoo's equal protection claim is essentially based on the same facts as his takings claim: he contends

that defendants' improper denial of his land use permit deprived him of the use and enjoyment of his property and caused him to incur monetary damage. To the extent his equal protection claim is actually a takings claim, the claim is, therefore, barred for his failure to seek relief in state court.

Even assuming Donohoo meant to plead an equal protection claim that is factually distinct from a takings theory, his claim fails on the merits. His equal protection claim is not based on an allegation that defendants discriminated against him because of his race, religion or any other protected characteristic. Rather, Donohoo seems to be alleging a "class-of-one" equal protection claim, based on his allegations that defendants rejected his permit and later imposed unreasonable or unlawful mitigation requirements simply because they did not like him or his construction proposal. However, "unless the plaintiff is able to show that there was no rational basis for the officials' actions," a land-use decision does not support a class-of-one claim. Miller, 784 F.3d at 1120 (citation omitted). See also Patel, 383 F.3d at 573 ("Absent a fundamental right or a suspect class, to demonstrate a viable equal protection claim in the land-use context, the plaintiff must demonstrate 'governmental action wholly impossible to relate to legitimate governmental objectives.' ") (citation omitted). "Normally, a class-of-one plaintiff will show an absence of rational basis by identifying some comparator—that is, some similarly situated person who was treated differently." Miller, 784 F.3d at 1120 (citation omitted). To be similarly situated, a comparator must be "'identical or directly comparable' " to the plaintiff " 'in all material respects.' "Id. (citation omitted).

*7 Here, Donohoo has identified no suitable comparator. He asserts vaguely in his brief that the County failed to "furnish on a timely basis a land use permit to [him] despite furnishing similar land use permits to others," but he does not expand upon this argument by identifying who those "others" are. Nor does he point to any specific facts about the approval of permits for these "others." Plt.s' Br., dkt. # 54, at 2.7

In fairness, the lack of a comparator does not necessarily doom Donohoo's claim. See Thayer v. Chiczewski, 705 F.3d 237, 254 (7th Cir.2012); Del Marcelle v. Brown County Corp., 680 F.3d 887, 913 (7th Cir.2012). A plaintiff need not identify a similarly situated person to prove a class-of-one claim if the plaintiff can "exclude rational explanations for why local officials targeted them." Miller, 784 F.3d at 1120 (citing Geinosky v. City of Chicago, 675 F.3d 743, 748 n. 3 (7th Cir.2012); Swanson v. City of Chetek, 719 F.3d 780, 785 (7th

Cir.2013)).

For example, in *Geinosky*, the plaintiff was allowed to proceed on a class-of-one claim against officers from a single police unit who issued 24 bogus tickets to him in the course of 14 months. *Geinosky*, 675 F.3d at 745–48. The Seventh Circuit reasoned that the "extraordinary pattern of baseless tickets" amounted to a plausible class-of-one claim, particularly since "[r]eason and common sense provide no answer to why he was targeted that could be considered a legitimate exercise of police discretion." *Id.* at 748.

Similarly, in *Swanson*, the Seventh Circuit reversed the grant of summary judgment against plaintiffs whose neighbor, the local mayor, apparently engaged in prolonged harassment against them after they tried to build a fence between their property and his. *Swanson*, 719 F.3d at 784–85. The mayor's actions—which included entering the plaintiffs' home without permission, abusing his position to delay issuance of a fence permit, shouting at them during a meeting about the permit, telling the plaintiffs' contractors that they were drug dealers and unlikely to pay, and causing the initiation of baseless prosecution in municipal court—appeared "illegitimate on their face" and "demonstrate[d] overt hostility." *Id.* at 782, 785.

Obviously, Donohoo's situation is readily distinguishable from the outrageous conduct considered in Geinosky and Swanson. The undisputed facts of record reveal a rational basis for Rannenberg's and the Board's denial of Donohoo's initial permit request. At the time Donohoo filed his initial permit application, the law regarding shoreland zoning was in flux. After contacting WDNR officials for guidance, Rannenberg had reason to believe that certain Douglas County shoreland zoning ordinances continued to apply and the Board in turn had reason to accept his explanation. Moreover, the day after the County ordinances were amended, Rannenberg contacted Donohoo regarding his permit application. Whether or not Rannenberg and the Board interpreted the law correctly, their decisions to deny his permit were not irrational and do not permit any inference of vindictiveness or hostility toward Donohoo. Nor has Donohoo shown that any other actions by Rannenberg or the Board were irrational. Cf. Indiana Land Co., LLC v. City of Greenwood, 378 F.3d 705, 712 (7th Cir.2004) (no inference of vindictiveness when council member "dredg [ed] up what may have been the largely forgotten or ignored two-thirds ordinance" that resulted in denial of the plaintiff's permit request). Accordingly, Donohoo has not shown that defendants violated his right to equal protection.

III. Due Process Claim.

*8 This leaves Donohoo's due process claim. All too often due process is invoked because a party feels wronged, rather than because they have been denied due process. This is just such a claim. The Due Process Clause prohibits the government from depriving any person of his or her property "without due process of law." This phrase has been interpreted to mean both that persons are entitled to process before their property is taken (procedural due process) and that they are free from arbitrary and capricious governmental actions (substantive due process). Bettendorf, 631 F.3d at 426; Hudson v. Palmer, 468 U.S. 517, 539 (1984).

The nature of Donohoo's due process claim is not entirely clear from either his complaint or the materials he filed in opposition to defendants' motion for summary judgment. If his due process claim is based on a takings theory—i.e., that the County's land use restrictions or permit decisions deprived him of use and enjoyment of his property—it must be dismissed for his failure to seek recourse in state court. See CEnergy-Glenmore, 769 F.3d at 489 ("[R]egardless of how a plaintiff labels an objectionable land-use decision (i.e., as a taking or as a deprivation without substantive or procedural due process), recourse must be made to state rather than federal court."); Greenfield Mills, Inc. v. Macklin, 361 F .3d 934, 961-62 (7th Cir.2004) (when a plaintiff's claim of violation of due process asks a federal court to review the same conduct that resulted in an alleged taking, the "exhaustion requirement applies with full force").

To the extent Donohoo is raising a due process claim distinct from a takings theory, he would first have to show that he was deprived of a "protectable property interest." *Muscarello*, 610 F.3d at 423. Assuming, without deciding, that Donohoo's requested use permit constituted a property interest that implicated due process, the next question is whether Donohoo has shown that he was deprived of that interest without the due process required by the Constitution.

With respect to procedural due process, "the process due in a zoning case is minimal and normally must be pursued in state courts." *Id. See also River Park*, 23 F.3d at 167 ("scant process is all that is 'due' in zoning cases"). For example, there is "no obligation to provide hearings" in a zoning case. *River Park*, 23 F.3d at 167. "[S]o far as the Constitution is concerned, state and local governments are not required to respect property owners' rights.... State and local governments may regulate and even take property," so long as they provide just compensation for taken property. *Id.* Thus, so long as there are adequate

local or state means for obtaining review of a zoning decision, procedural due process is satisfied. *Id.*

Here, Donohoo received an abundance of process beyond what he was "due," beginning with a hearing before the Board of Adjustment. He also exercised his right to certiorari review in state court. Moreover, he could have appealed the state court decision dismissing the certiorari action and chose not to do so. After he received his permit in May of 2013, he also could have filed a state certiorari action or an inverse condemnation action challenging the conditions of his permit, but again chose not to. Additionally, if Donohoo believed that the Board or the defendants failed to follow any local or state rules, or failed to properly respond to the state certiorari action. Donohoo's recourse was to seek relief in state court. Id. ("the only procedural rules at stake [in zoning cases] are those local law provides, and these rules must be vindicated in local courts"). In sum, the numerous means by which Donohoo could have sought, and did seek, review of defendants' actions more than satisfy the constitutional requirements of procedural due process.

*9 To prevail on a claim that defendants deprived him of substantive due process, Donohoo's burden is even greater, requiring a showing that defendants' actions were "arbitrary and capricious," "random and irrational" and "shocked the conscience." *CEnergy–Glenmore*, 769 F.3d at 488. Additionally, this circuit has emphasized that in order to state a substantive due process claim, a plaintiff must also allege that some other substantive constitutional right has been violated or that state remedies are inadequate. *Id.* at 489. Although a local land-use decision could "theoretically" violate this high standard, neither the Supreme Court nor the Seventh Circuit have ever "definitively concluded that any land-use decision actually amounted to a deprivation of property without substantive due process." *Id.* at 488.

Obviously, Donohoo does not come close to meeting this high standard. Donohoo has not identified any substantive constitutional right that defendants violated. The focus of his claim actually seems to be that defendants failed to apply the new state law, Act 170, despite knowing that it trumped local shoreland zoning ordinances. Plt.s' Br., dkt. # 54, at 2. Even assuming that Rannenberg and the Board violated state law by rejecting his initial permit request, however, "an error of state law is not a violation of due process." *Indiana Land Co., LLC v. City of Greenwoo* d, 378 F.3d 705, 711 (7th Cir.2004). Nor would a failure to apply this new state law implicate any other substantive constitutional right.

Donohoo also does not allege that state law remedies are

inadequate. Moreover, such an allegation would be groundless. In this very case, Donohoo pursued a certiorari action. He subsequently obtained a land use permit. Although the state court rejected Donohoo's request for fees, Donohoo did not avail himself of his right to appeal. He also did not challenge the terms of the permit he received in state court. Under these circumstances, Donohoo could not establish that the state remedial scheme was inadequate. *CEnergy–Glenmore*, 769 F.3d at 489 (affirming dismissal of due process claim where plaintiff "had options under state law for obtaining the building permits that it did not use").

Finally, Donohoo identifies no actions by Rannenberg or the Board that would constitute "arbitrary and capricious" or "random and irrational" decisions. Their decisions were made in the context of confusion regarding a newly enacted state law and after consultation with WDNR officials. Within a few months, the County amended its shoreland zoning ordinances and took the initiative to contact Donohoo personally about his requested permit. No reasonable jury could conclude that these actions "shocked the conscience." Accordingly, defendants are entitled to summary judgment on Donohoo's due process claim as well.

ORDER

IT IS ORDERED that:

- (1) Plaintiff Barry R. Donohoo's Motion for Leave to Amend Complaint, dkt. # 61, is DENIED.
- *10 (2) The Motion for Summary Judgment, dkt. # 27, filed by defendants Doug Hanson, Roger Wilson, Dale Johnson, Larry Luostari, Steven Rannenberg, Carolyn Pierce and Susan T. Sandvick is GRANTED.
- (3) The clerk of court is directed to enter judgment for defendants and close this case

All Citations

Not Reported in F.Supp.3d, 2015 WL 5177968

Footnotes

- Donohoo's request for leave to amend his complaint to add additional factual allegations and legal assertions will be denied as futile. (Dkt. # 61 at 1 (plaintiff explaining that his proposed amended complaint "maintains the counts and allegations against the same defendants from the original complaint," but merely adds additional facts learned during discovery to further support his claims).) At this stage, the additional allegations in the proposed pleading will not help Donohoo. In order to survive summary judgment, Donohoo was required to come forward with evidence sufficient to prove each element of his claims-the so-called "put up or shut up" stage in a lawsuit. *Olendzki v. Rossi*, 765 F.3d 742, 749 (7th Cir.2014). Donohoo failed to do so.
- The court finds the following facts material and undisputed unless otherwise noted. The facts are drawn from the defendants' proposed findings of fact, as well as Donohoo's evidentiary submissions and responses to defendants' proposed findings.
- Property within the Town of Solon Springs is subject to Douglas County's zoning ordinances.
- The parties dispute the extent to which Donohoo was allowed to present evidence and argument at the hearing. Defendants say that Donohoo had the opportunity to present his arguments as to why Act 170 required the Board to grant his permit, while Donohoo says that the Board refused to allow him to present some evidentiary exhibits and refused to allow his father, who is an attorney, to present his interpretation of the relevant law. These disputes are immaterial for the purposes of summary judgment because, even under Donohoo's version of events, he has not shown that his constitutional rights were violated even if his right to speak was somewhat truncated. See discussion on page 16–18, *infra*.
- The parties dispute the extent to which the audio recording was actually compromised or whether the County made sufficient effort to repair it. This dispute is also ultimately irrelevant for purposes of summary judgment. As discussed on page 17, *infra*, any complaint plaintiff had regarding the adequacy of defendants' production or their responsiveness to the certiorari action could and should have been raised in that action. Defendants' alleged failure to properly respond to an order from the state court does not provide the basis for a federal constitutional claim.

- Even after the permit was issued, Donohoo apparently continued to object to conditions imposed on his project. At some point in September or October 2013, Rannenberg gave Donohoo a copy of the permit without any conditions included, although Rannenberg insists that he simply made a copy of the original permit with the conditions covered in order to placate Donohoo, even though both he and Donohoo understood that the original permit imposed various mitigation requirements. See Rannenberg Aff., dkt. # 36, ¶ 53. Donohoo maintains that Rannenberg's action was intended to and did confuse him, causing him to believe that all of the conditions had been removed from his permit. See Donohoo Aff., dkt. # 59, at ¶ 10. the basis for a federal constitutional claim.
- Donohoo might be referring to two land use permits issued by the County in 2013 and 2014 for construction to homes located on Lake of the Woods. He submitted with his summary judgment materials copies of two permits: (1) a June 11, 2013 permit issued to "Ruth Erdmann–Sluka" granting permission to construct a basement under her existing home, (dkt.# 57); and (2) an October 16, 2014 permit issued to Michael J. and Darla Higgins, granting permission to construct a second-story on their home, (dkt.# 58). But Donohoo does not explain why these permit-seekers should be considered to be "similarly-situated" to him. On the contrary, even on the face of these permits, these landowners obviously received land use permits after the County had already amended its shoreland zoning ordinances in December of2012 and after Rannenberg told Donohoo that his own permit application would be approved, subject to an acceptable mitigation plan. And even if these permit holders were similarly situated to Donohoo, he has not explained why he believes they were treated more favorably than he was. Indeed, their permits show that they, like Donohoo, were required to submit mitigation plans.

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EXHIBIT E

639 Fed.Appx. 118

This case was not selected for publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 3rd Cir. App. I, IOP 5.1, 5.3, and 5.7.

United States Court of Appeals,

Third Circuit.

ECOTONE FARM LLC and William R. Huff, Appellants

Edward A. WARD, II; Township of Harding; Paul D. Fox; New Jersey Conservation Foundation; Harding Township Committee; Marshall Bartlett; Louis Lanzerotti; Regina Egea; James Rybka; Nicholas Platt; Sally Ward; APGAR Associates.

> No. 14–3625. | Argued Nov. 10, 2015. | Opinion Filed: Jan. 28, 2016.

Synopsis

Background: Property owners commenced action against township engineer, owner of adjacent parcel with ingressegress easement over plaintiff's property, township, township committee, and individual members of township committee for violation of their substantive due process rights, equal protection rights, and procedural due process rights, for conspiracy to violate constitutional rights, and violation of state law. The United States District Court for the District of New Jersey, Kevin McNulty, J., dismissed the action. Plaintiffs appealed.

Holdings: The Court of Appeals, Chagares, Circuit Judge, held that:

[1] owners stated that defendants treated them differently in development of their property from others similarly situated, as required for "class-of-one" equal protection claim;

- [2] owners stated that defendants did not have any rational basis for treating them differently from others similarly situated;
- [3] owners' accusations that depicted corruption and repeated abuse of government power by defendants with deliberate aim of harming them were conscience-shocking, and thus sufficient to sustain substantive due process claim;
- [4] owners satisfied requirement of action under color of state law;
- [5] irrational actions of township engineer in enforcing soil disturbance ordinance against owners could be attributed to township; and
- [6] committee did not approve specific decisions of engineer by merely reappointing engineer with awareness of complaints about his conduct.

Affirmed in part and reversed in part.

West Headnotes (7)

[1] Constitutional Law

Real property in general

Municipal Corporations

Discrimination

Property owners stated that defendant township engineer, township, township committee, and individual members of township committee treated them differently in development of their property from others similarly situated, as required for "classof-one" equal protection civil rights claim, on allegations that "other proximate and/ or similarly situated properties were not accorded the treatment suffered by Plaintiffs and complained of herein" which was made plausible by totality of complaint that described "pattern of unjustified harassment"; under those circumstances, specific descriptions of others similarly situated were not required at pleadings stage.

U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[2] Constitutional Law

- Real property in general

Municipal Corporations

Discrimination

Property owners stated that defendant township engineer, township, township committee, and individual members of township committee did not have any rational basis for treating them differently in development of their property from others similarly situated, as required for "classof-one" equal protection civil rights claim; among other things, complaint described factual setting in which there was no violation of easements, no real question about whether renovation was "major development" for storm water management purposes, and therefore no legitimate rationale for defendants to impose barriers to renovation. U.S.C.A. Const. Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[3] Constitutional Law

- Real property in general

Municipal Corporations

Discrimination

Property owners stated that defendant township engineer, township, township committee, and individual members of township committee did not have any rational basis for treating them differently in development of their property from others similarly situated, as required for "class-of-one" equal protection civil rights claim, on allegations that engineer irrationally enforced original soil disturbance ordinance against them because revised soil disturbance plan was in effect and engineer knew that before filing violation. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983; N.J.S.A. 4:24–45.

Cases that cite this headnote

[4] Constitutional Law

- Real property in general

Municipal Corporations

Discrimination

Property owners' accusations that depicted corruption and repeated abuse of government power by township engineer, township, township committee, and individual members of township committee with deliberate aim of harming owners were "conscience-shocking," and thus sufficient to sustain substantive due process claim at pleadings stage; owners accused engineer and committee member of conspiring to use their government positions to harass them repeatedly and obstruct full enjoyment of their land over course of several years, motivated by personal vendettas and expectation that their own private interests would be advanced. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

Cases that cite this headnote

[5] Civil Rights

Officers and public employees, in general

Township committeeman's longstanding private vendetta against adjoining property owners who were renovating their property, which predated his tenure as committeeman, along with his harassment of those owners in manner not requiring use of his stateprovided power, did not preclude finding that committeeman, who had ability to influence whether township engineer would keep his job, at certain point somehow used his office to magnify impact of his private action by convincing township engineer to harass adjoining property owners and share documents that facilitated committeeman's own complaints, as required to satisfy requirement for action "under color of state law" in owners' § 1983 equal protection and substantive due process claims. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[6] Civil Rights

Property and housing

Irrational actions of township engineer in enforcing soil disturbance ordinance against property owners who were renovating their property could be attributed to township, as required for township to be liable in owners' § 1983 "class-of-one" equal protection claim in connection with that enforcement, since engineer was final policymaker with regard to that enforcement. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

2 Cases that cite this headnote

[7] Civil Rights

Property and housing

Township committee did not ratify specific decisions of township engineer in enforcing soil disturbance ordinance against property owners who were renovating their property, in alleged violation of owners' equal protection rights, by merely reappointing engineer with awareness of complaints about his conduct, and thus township could not be liable on that basis in owners' § 1983 "class-of-one" equal protection claim in connection with that enforcement; even if one committeeman was involved in engineer's alleged misconduct, single member of committee did not have power to set policy for township. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

*120 On Appeal from the United States District Court for the District of New Jersey (D.C. Civil No. 2–11–cv–05094), District Judge: Hon. Kevin McNulty.

Attorneys and Law Firms

Richard A. Bodnar, Esq., Thomas E. Redburn, Jr., Esq., (Argued), Lawrence M. Rolnick, Esq., Lowenstein Sandler, Roseland, NJ, Counsel for Appellants.

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Craig L. Corson, Esq., Michael F. Dolan, Esq., (Argued), Hoagland Longo Moran Dunst & Doukas, New Brunswick, NJ, Counsel for Appellees Paul D. Fox and Apgar Associates.

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George C. Jones, Esq., Graham Curtin, Morristown, NJ, Counsel for Appellee Sally Ward.

Before: CHAGARES, RENDELL, and BARRY, Circuit Judges.

OPINION*

CHAGARES, Circuit Judge.

This is an appeal from an amended opinion and order, dated July 23, 2014, of the United States District Court for the District of New Jersey, dismissing at the pleadings stage all federal claims against the defendants on qualified immunity *121 grounds because the plaintiffs had not adequately alleged that their constitutional rights were violated, and declining to exercise supplemental jurisdiction over the state-law claims. For the reasons that follow, we will affirm in part and reverse in part.

I.

Because we write exclusively for the parties, we set forth only those facts necessary to our disposition. Plaintiff William Huff is the managing member of coplaintiff Ecotone Farm LLC and the owner of a 31–

acre plot of land in Harding Township, New Jersey ("the Property"), where Ecotone conducts farming activity. This lawsuit concerns Huff's efforts to renovate a house and two barns on the Property, which he says were thwarted by twelve defendants: his neighbors Edward and Sally Ward; the Township of Harding; the Harding Township Committee; the individual members of the Harding Township Committee (Edward Ward, Marshall Bartlett, Louis Lanzerotti, Regina Egea, James Rybka, and Nicholas Platt); the township engineer Paul Fox; Fox's engineering firm Apgar Associates; and the New Jersey Conservation Foundation ("NJCF"), which holds a conservation easement over the Property.

Huff purchased the Property in 1987. In approving the estate sale, a state court imposed a conservation easement on the Property to prevent further subdivision, with rights running to the NJCF. The Wards ¹ owned an adjacent parcel with an ingress/egress easement permitting them to use Huff's land for a driveway to the public road. Litigation broke out between Huff and the Wards when Huff installed speed bumps in the driveway to prevent the Wards from speeding through, and the Wards responded by destroying the speed bumps. They reached a settlement in 1998, but there was a subsequent legal battle over whether the Wards had complied with the terms of the settlement.

Ward, motivated by animosity from those earlier disputes, made baseless reports to environmental authorities in 2001-02 about Huff's activities on the Property as a means of harassment and instructed the township engineer, Fox, to do the same. After Ward was elected to the Township Committee in 2008, he became Fox's "boss" and "enlist[ed]" Fox to interfere with Huff's renovation. Second Amended Compl. ("SAC") ¶ 3-4. Fox's compliance "ensure[d] [his] reappointment as Township Engineer," and his obstruction of Huff's renovation allowed him to "line [his] pockets through baseless engineering charges." Id. ¶¶ 5-6. Huff accuses both Fox and Ward of harboring "personal animus" towards him. Id. \P 2, 4. Fox openly expressed to others his animosity towards Huff and desire to prevent Huff from obtaining construction permits. Fox also had a financial motive to support Ward and the NJCF. His engineering firm counts NJCF among its clients and receives referrals from Ward, who is a real estate broker.

In 2008, Huff began renovating one of the barns on the Property. The conservation easement permitted him to maintain and replace existing structures, and he obtained zoning approvals and building permits. But Ward and Fox took steps to prevent the renovation from going forward. First, in November 2008 and again in January 2009, Ward tried and failed to have the police halt the renovation by claiming that it made the driveway unsafe. Then in January 2009, Ward emailed Fox court documents from the earlier driveway litigation, and Fox then circulated the documents, *122 along with his own amateur legal analysis, to other township officials and stated his intent to condition his approval of Huff's renovation plans on Ward's approval of any changes near the driveway. That same month, the NJCF mailed Huff a letter about "Storage Area 2," a portion of the Property near the barn where soil and materials involved in the renovation were temporarily stored, which the NJCF claimed violated the conservation easement. Fox also received a copy of the NJCF's letter and, in March 2009, sent Huff a letter saying that the township could not approve any improvements to the driveway area that would violate the conservation easement. He instructed Huff to revise his soil disturbance plan in light of Storage Area 2 and to demonstrate that there were "no legal impediments" arising from the Wards' ingress/egress easement. Id. ¶¶ 73–76. Fox's letter also required Huff's plans to provide for continuous access to both residences at all times with no blockage, which Fox knew to be functionally impossible given the needs of the renovation.

In April 2009, Huff submitted a revised soil disturbance plan, taking account of Storage Area 2, but then heard nothing from Fox for months. Meanwhile, Fox forwarded the revised plan to the NJCF to seek its position, and the NJCF wrote back to object to the plan. Fox continued to correspond with the NJCF and seek its consent throughout the process, which gave the NJCF potential leverage over Huff to renegotiate the terms of its conservation easement. Fox provided Ward and the NJCF with copies of documents relating to the renovation. Fox and Ward also forwarded documentation of the NJCF's opposition to the renovation to other township departments, including the Health Department, which would later deny Huff's application to drill a new well on the Property because of its location within the conservation easement.

In September 2009, Huff received a Notice of Violation concerning Storage Area 2, accusing him of violating the *original* soil disturbance plan, despite the fact that Huff had submitted the revised plan, which had been approved by default by virtue of Fox's failure to respond to it within thirty days. On October 1, 2009, Fox issued Huff a summons and complaint for violating section 105–104A of Harding Township's municipal code ("the soil disturbance ordinance"). ² The soil disturbance ordinance vests Fox with exclusive enforcement authority, and Huff was the only person against whom the ordinance had ever been enforced.

Huff brought his own state court action, which was resolved in the spring of 2011 when Harding Township agreed to drop the October 2009 enforcement action, as well as its objections to the renovation based on the conservation easement. Fox then issued an engineering review requiring Huff to seek a determination from the New Jersey Department of Environmental Protection ("NJDEP") that the renovation was not a "major development" for stormwater management purposes, despite the fact that the township had already requested, and the NJDEP had already made, that determination on several previous occasions. Fox also threatened to issue a Notice of Violation and encouraged and assisted the NJCF to object to the NJDEP's issuance of permits to Huff. On *123 July 12, 2011, Huff received yet another NJDEP determination that the renovation was not a major development, which was reaffirmed when Fox himself called the NJDEP in November 2011 to discuss the issue, at which point Fox finally backed down.

At a January 2012 meeting of the Township Committee, Committeeman Bartlett rejected a proposal to open the township engineer position to competitive bidding, arguing that it would be better to stick with Fox in light of the ongoing litigation. Other committee members approved Fox's reappointment despite having seen "extensive information on Fox's abusive conduct." *Id.* ¶ 11.

The plaintiffs claim that as a result of all this harassment and obstructionism by the defendants, they incurred significant administrative costs and attorney's fees and lost full enjoyment of the Property. They are suing Fox, Ward, the Township of Harding, the Township Committee, and the individual members of the Township Committee under 42 U.S.C. § 1983 for violation of their substantive due

process rights (Count 1), equal protection rights (Count 2), and procedural due process rights (Count 3), and are suing all individual defendants for conspiracy to violate constitutional rights, in violation of 42 U.S.C. § 1985(3) (Count 4). The complaint also contains eleven counts under state law.

In granting the defendants' motion under Federal Rule of Civil Procedure 12(b)(6), the District Court determined that the defendants' qualified immunity defense was apparent on the face of the complaint. See Leveto v. Lapina, 258 F.3d 156, 161 (3d Cir.2001) ("Although immunity is an affirmative defense, a complaint may be subject to dismissal under Rule 12(b)(6) when an affirmative defense ... appears on its face." (quotation marks omitted)). Relying upon only the first prong of the defense ("whether the plaintiff has alleged the deprivation of an actual [federal] right at all," id. at 162), the District Court effectively applied the usual Rule 12(b)(6) standard for failure to state a claim.

The District Court dismissed the section 1983 claims against Bartlett, Lanzerotti, Egea, Rybka, and Platt because there were no allegations about their personal involvement in constitutional violations; the claims against Ward because the allegations concerned his conduct as a private citizen and not under color of state law; and the claims against Harding Township because of insufficient allegations of a municipal policy or custom. The District Court then addressed whether the federal claims stated valid causes of action with reference to Fox (although the District Court concluded that the same principles would apply to the other defendants). With regard to substantive due process, it found the allegations insufficient to meet the "shocks the conscience" standard. It found the equal protection allegations insufficient because the plaintiffs had not identified any similarly situated individuals who were treated differently, and the mere fact that the soil disturbance ordinance had never been enforced against anyone else was insufficient to show irrational disparate treatment. It dismissed the procedural due process claim because the complaint did not describe the state procedures that were allegedly inadequate. Finally, it dismissed the conspiracy claim under section 1985(3) because the claim was not related to class-based discrimination, such as race discrimination.

II.

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1367, and we have jurisdiction to review the final decision *124 of the District Court under 28 U.S.C. § 1291.

"Our review of both a dismissal under Fed.R.Civ.P. 12(b) (6) and a grant of qualified immunity is plenary." *Leveto*, 258 F.3d at 161. "In reviewing the dismissal of a claim under Rule 12(b)(6), we must accept the allegations of the complaint as true and draw all reasonable inferences in the light most favorable to the plaintiff[s]." *Id.* (quotation marks omitted). "[P]laintiff[s] must allege enough facts to state a claim to relief that is plausible on its face." *New Jersey Carpenters & the Trustees Thereof v. Tishman Const. Corp. of New Jersey*, 760 F.3d 297, 302 (3d Cir.2014) (quotation marks omitted). "This same approach must be followed when qualified immunity is asserted in a Rule 12(b)(6) motion." *Leveto*, 258 F.3d at 161.

III.

For the reasons that follow, we will reverse and remand to the District Court the plaintiffs' equal protection claim as against defendants Ward, Fox, and Harding Township, substantive due process claim as against defendants Ward and Fox, and pendent state-law claims. We will affirm in all other respects.

A.

Under the "class-of-one" theory recognized in *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000), a plaintiff may state an equal protection claim by alleging that "(1) the defendant treated him differently from others similarly situated, (2) the defendant did so intentionally, and (3) there was no rational basis for the difference in treatment." *Hill v. Borough of Kutztown*, 455 F.3d 225, 239 (3d Cir.2006). Because the plaintiffs' allegations, accepted as true and construed in the light most favorable to them, meet this standard, we conclude that the District Court erred in dismissing their equal protection claim.

[1] The complaint is sufficient with regard to the first element. The plaintiffs allege that "other proximate and/or similarly situated properties were not accorded the treatment suffered by Plaintiffs and complained of herein." SAC ¶ 123. The allegation is made plausible by the totality of the complaint, which describes a "pattern of unjustified harassment." *Geinosky v. City of Chicago*, 675 F.3d 743, 748 & n. 3 (7th Cir.2012). Under those circumstances, specific descriptions of others similarly situated are not required at the pleadings stage. *See id.*

The defendants do not challenge the second element of the class-of-one claim, as the complaint plainly alleges intentional action by the defendants.

As to the third element, although there may [2] well have been a rational basis for the defendants' treatment of the plaintiffs, that rational basis is not apparent from the complaint. The complaint repeatedly characterizes the defendants' conduct as "discriminatory, arbitrary, capricious, unreasonable, malicious, improperly motivated, and conscienceshocking," SAC ¶ 123, and motivated by "personal animus," SAC ¶¶ 2, 4. More importantly, the complaint describes a factual setting in which there was no violation of the easements, no real question about whether the renovation was a "major development" for stormwater management purposes, and therefore no legitimate rationale for the defendants to impose barriers to the renovation. This is sufficient at the pleadings stage.

Even Fox's enforcement of the soil disturbance [3] ordinance is lacking an apparent rational basis, despite the fact that Huff admits to storing construction materials in Storage Area 2. "[I]t is possible *125 for plaintiffs to plead themselves out of court if their complaint reveals a potential rational basis for the actions of local officials," Miller v. City of Monona, 784 F.3d 1113, 1121-22 (7th Cir.2015), but the plaintiffs have not done so here. The Notice of Violation was issued in September 2009 and the enforcement action filed in October 2009 on the basis of the original soil disturbance plan, even though months earlier on April 23, 2009, Fox received Huff's revised soil disturbance plan that took account of Storage Area 2. State and local law provide that soil disturbance plans submitted to local officials take effect after thirty days if not rejected before then. See N.J. Stat. Ann. § 4:24-45; Harding Township, N.J., Code § 22589(C)(1). Several months elapsed between Huff's submission of the revised

plan and Fox's Notice of Violation, during which Fox forwarded the revised plan to the NJCF for comment. Thus, the revised plan was in effect, and it could plausibly be inferred that Fox knew this before filing the violation and could not have rationally relied on the original plan as a basis for issuing the Notice of Violation.

Accordingly, the District Court erred in dismissing the plaintiffs' equal protection claim. ³

B.

Land ownership "is a property interest worthy of substantive due process protection." *DeBlasio v. Zoning Bd. of Adjustment for Twp. of W. Amwell,* 53 F.3d 592, 600 (3d Cir.1995), *overruled on other grounds by United Artists Theatre Circuit, Inc. v. Twp. of Warrington, PA,* 316 F.3d 392 (3d Cir.2003). Executive action (as distinguished from legislation) violates substantive due process protections "only when it shocks the conscience ... the meaning of [which] varies depending on the factual context." *United Artists,* 316 F.3d at 399–400. The complaint, construed in the light most favorable to the plaintiffs, sufficiently alleges conscience-shocking executive action on the part of the defendants. The District Court therefore erred in dismissing the plaintiffs' substantive due process claim.

Land-use decisions are generally "matters of local concern" and "should not be transformed into substantive due process claims based only on allegations that government officials acted with 'improper' motives" because "the term 'improper' sweeps much more broadly" than the "shocks the conscience" standard. *Id.* at 400, 402. A government official's motives can be improper in some way without being conscience-shocking. But that does not mean that executive actions undertaken with improper motives are never conscience-shocking. Indeed, "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." Cnty. of Sacramento v. Lewis, 523 U.S. 833, 849, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). In affirming the dismissal of a substantive due process claim in *Eichenlaub v. Township* of Indiana, 385 F.3d 274 (3d Cir.2004), we specifically noted the absence of allegations that local officials were motivated by "corruption or self-dealing" or "bias against an ethnic group," suggesting that the presence of such

motives might conceivably change the outcome. *Id.* at 285–86.

*126 The plaintiffs accuse Ward and Fox of conspiring to use their government positions to harass them repeatedly and obstruct full enjoyment of their land over the course of several years, motivated by personal vendettas and the expectation that their own private interests would be advanced (in Ward's case, gaining greater control over his easement, and in Fox's case, collecting large fees throughout the process and currying favor with Ward and the NJCF, who provide him with work). These accusations rise above the mere allegation of an "improper" motive and depict corruption and repeated abuse of government power with the deliberate aim of harming someone. They are conscience-shocking and sufficient to sustain a substantive due process claim at the pleadings stage. 4

C.

"A finding of liability under 42 U.S.C. § 1983 requires that the defendant ... have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Bonenberger v. Plymouth Twp.*, 132 F.3d 20, 23 (3d Cir.1997) (quotation marks omitted). The District Court erred in concluding that Ward did not act under color of state law; the allegations concerning Ward meet the standard.

"[A] state employee who pursues purely private motives and whose interaction with the victim is unconnected with his execution of official duties does not act under color of law," but "off-duty police officers who flash a badge or otherwise purport to exercise official authority generally act under color of law." *Id.* at 24. "[I]nformal, behind the scenes exertion of state authority is as much within the scope of § 1983 as the more usual examples of formal and open action leading to the denial of federal rights." *Kletschka v. Driver*, 411 F.2d 436, 447 (2d Cir.1969).

[5] After Ward was elected to the Township Committee in 2008, he became Fox's "boss" and "enlist[ed]" Fox to interfere with Huff's renovation, and Fox's misconduct "ensure[d] [his] reappointment as Township Engineer by Ward." SAC ¶¶ 3–5. Ward also "kept tabs on" the situation "by using his position, influence, and

relationship with defendant Fox to obtain copies of correspondence" between Huff and Fox, and "Fox improperly shared private documents concerning the barn renovation with Ward." *Id.* ¶ 82. The clear and fair implication of these allegations is that Ward wielded his supervisory position over Fox—in particular, his ability to influence whether Fox would keep his job—to convince Fox to harass the plaintiffs and share documents that facilitated Ward's own complaints. That suffices to allege action under color of state law. ⁵

*127 The defendants make much of the fact that Ward was motivated by a longstanding private vendetta predating his tenure as committeeman, and that on some occasions Ward sought to harass the plaintiffs in a manner not requiring use of his state-provided power (for example, by calling police to report the renovation as unsafe). But none of that precludes a finding that at a certain point Ward "somehow us[ed] [his] office to magnify the impact of his private action." Tierney v. Vahle, 304 F.3d 734, 741 (7th Cir.2002); see also Griffin v. State of Md., 378 U.S. 130, 135, 84 S.Ct. 1770, 12 L.Ed.2d 754 (1964) ("If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity...."); Rivera v. La Porte, 896 F.2d 691, 696 (2d Cir.1990) ("Though the dispute that precipitated the arrest was private, the response, including the arrest ... was unquestionably action under color of law.").

D.

[6] The District Court also erred in concluding that none of Fox's actions could be attributed to Harding Township under *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) and its progeny. Because Fox himself was the final policymaker with regard to enforcing the soil disturbance ordinance, any violation of equal protection rights in connection with that enforcement is attributable to Harding Township. But that enforcement is the only instance of alleged harassment attributable to Harding Township and, viewed in isolation from the entire course of harassment, would not "shock the conscience." We therefore will reverse the District Court's finding as to *Monell* liability only with respect to the equal protection claim.

"[A] municipality may only be liable for the torts of its employees in one of three ways: First, the municipality will be liable if its employee acted pursuant to a formal government policy or a standard operating procedure long accepted within the government entity; second, liability will attach when the individual has policy making authority rendering his or her behavior an act of official government policy; third, the municipality will be liable if an official with authority has ratified the unconstitutional actions of a subordinate, rendering such behavior official for liability purposes." *McGreevy v. Stroup*, 413 F.3d 359, 367 (3d Cir.2005) (citations omitted).

[7] We reject the plaintiffs' argument that the township ratified all of Fox's conduct. They claim that Ward himself ratified Fox's conduct on behalf of the township but cite no authority for the proposition that Ward, acting as a single member of the Township Committee, had power to set policy for Harding Township. As for the committee acting collectively, ratification occurs "[i]f the authorized policymakers approve a subordinate's decision and the basis for it." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988) (plurality). The committee cannot be said to have "approved" Fox's specific decisions and bases for them merely because it reappointed him as municipal engineer with awareness of complaints about his conduct.

But Fox's decision to enforce the soil disturbance ordinance is attributable to the township because he was the final policymaker in that domain. "[A]n official *128 with policymaking authority can create official policy, even by rendering a single decision." *McGreevy*, 413 F.3d at 367–68. "[A]n official has final policy-making authority, and can thus bind the municipality by his conduct" if "the official is responsible for making policy in the particular area of municipal business in question" and "the official's authority to make policy in that area is *final and unreviewable*." *Hill*, 455 F.3d at 245 (emphases in original). This "is a question of state law." *Praprotnik*, 485 U.S. at 124, 108 S.Ct. 915.

Harding Township's soil disturbance ordinance provides:ss

The provisions of this article shall be enforced by the Township Engineer, who shall also inspect or require adequate inspection of the work carried out pursuant to this article. If the Township Engineer finds any existing conditions not as stated in the applicant's erosion and sediment control plan and application, he or she may refuse to approve further work and may require necessary erosion and sedimentation control measures to be promptly installed and may require modifications to the plan when, in his or her judgment, such are necessary to properly control erosion and sediment. He or she may also seek other penalties as provided in § 225-94.

Harding Township, N.J., Code § 225-92. An aggrieved party may ask the "Township Authority" reconsideration and then appeal to the State Soil Conservation Committee. Id. § 225-93(B). But the "Township Authority" is defined as "[t]he Township Engineer "-Fox himself-"and such other departments, employees, officials or consultants as have been authorized by the Township Committee to approve plans required by this article." Id. § 225-89 (emphasis added). The defendants have failed to point to any municipal official who could potentially have overruled Fox. And the possibility of appeal to the state committee does not make Fox's decision any less final as to the township's policy. Thus, Fox's decision to enforce the soil disturbance ordinance was final and unreviewable for Monell purposes.

E.

The plaintiffs have made no argument that the District Court erred in dismissing their procedural due process claim, so we consider that issue abandoned. We have also considered the plaintiffs' arguments with regard to Count Four of the complaint (conspiracy to violate constitutional rights) and with regard to the personal involvement of defendants Bartlett, Lanzerotti, Egea, Rybka, and Platt, which we find to be without merit. We therefore will affirm the District Court's judgment as to those issues.

We will remand the pendent state-law claims because they were dismissed on the premise that no federal claims remained, which is no longer true, but we express no view as to the merits of those claims or whether the District Court should, in its discretion, exercise supplemental jurisdiction over them.

IV.

For the foregoing reasons, the judgment of the District Court will be reversed and remanded as to the plaintiffs' equal protection claim as against defendants Ward, Fox, and Harding Township, substantive due process claim as against defendants Ward and Fox, and pendent state-law claims. The judgment will be affirmed in all other respects.

All Citations

639 Fed.Appx. 118

Footnotes

- * This disposition is not an opinion of the full court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.
- 1 Hereinafter, the singular "Ward" will refer to Mr. Ward.
- Although the parties refer to "section 105–104A," the relevant ordinances are currently codified at chapter 225 of the municipal code, not chapter 105. As the parties have not provided historical versions of the ordinances or suggested that the ordinances were substantively modified when renumbered, we rely on the publicly accessible version of the ordinances, codified at chapter 225.
- The District Court did not reach the second step of its qualified immunity analysis (whether the law was "clearly established"), and the parties have not briefed this issue on appeal. We therefore express no view on the matter and leave it for the District Court to consider in the first instance if necessary.
- 4 As with the equal protection claim, the District Court did not reach the second step of its qualified immunity analysis (whether the law was "clearly established") regarding the substantive due process claim, and the parties have not briefed this issue on appeal. We therefore express no view on the matter and leave it for the District Court to consider in the first instance if necessary.

The complaint does not describe a particular moment at which Ward expressly asserted his authority in order to persuade Fox, but we do not believe that is required here, given that the allegations clearly and fairly imply an "assertion ... of official authority" or "imprimatur of state authority." Barna v. City of Perth Amboy, 42 F.3d 809, 818 (3d Cir.1994). We would, however, distinguish our case from a situation in which the mere prestige of an office magnifies a government official's influence, in the absence of even a hint from the official that she would exercise her powers differently depending on the response to her requests. See Hall v. Witteman, 584 F.3d 859, 866 (10th Cir.2009) (listing cases) ("Exploiting the personal prestige of one's public position is not state action absent at least some suggestion that the holder would exercise governmental power.").

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EXHIBIT F

2015 WL 12916439 Only the Westlaw citation is currently available. United States District Court, W.D. Texas, El Paso Division.

THREE LEGGED MONKEY, L.P. and JAMES MICHAEL ARMSTRONG, Plaintiffs,

CITY OF EL PASO, TEXAS; DAVID BRANDT, individually and as Trustee and General Partner of Hawkins Plaza; PATRIOT PLACE LTD; EMMA ACOSTA, in her official and individual capacity as City Representative for District Three of El Paso, Texas and as a private individual; JOYCE WILSON, in her official and individual capacity as City Manager of El Paso, Texas and as a private citizen; STEVE ORTEGA, in his official and individual capacity as City Representative for District Seven of El Paso, Texas; JOHN F. COOK, in his official capacity as Mayor of the City of El Paso; SUSANNAH M. BYRD, in her official and individual capacity as City Representative of District Two of El Paso, Texas; EL PASO INTERNATIONAL AIRPORT; ANN MORGAN LILLY, in her official and individual capacity as Representative for District One of El Paso, Texas and as a private citizen, Defendants.

> EP-14-CV-00260-FM | Filed 01/08/2015

ORDER GRANTING IN PART AND DENYING IN PART THE CITY AND CITY DEFENDANTS' SECOND MOTION TO DISMISS

FRANK MONTALVO UNITED STATES DISTRICT JUDGE

*1 On this day, the court considered "Defendants' City of El Paso, Texas; El Paso International Airport; Emma Acosta; John F. Cook; Ann Morgan Lil[l]y; Susannah M. Byrd; Steve Ortega; and Joyce Wilson Rule 12(b) Motion to Dismiss Plaintiffs' Second Amended Complaint" ("Second Motion to Dismiss") [ECF No. 36], filed November 17, 2014; "Plaintiffs' Response to Defendants' City of El Paso, Texas; El Paso International Airport;

Emma Aco[s]ta; John F. Cook; Ann Morgan Lilly; Susannah M. Byrd; Steve Ortega; and Joyce Wilson Rule 12(b) Motion to Dismiss Plaintiffs' Second Amended Complaint" ("Response") [ECF No. 38], filed December 1, 2014; and "Defendants' Reply to Plaintiffs' Response to Defendants' City of El Paso, Texas; El Paso International Airport; Emma Acosta; John F. Cook; Ann Morgan Lil[l]y; Susannah M. Byrd; Steve Ortega; and Joyce Wilson Rule 12(b) Motion to Dismiss Plaintiffs' Second Amended Complaint" ("Reply") [ECF No. 44], filed December 8, 2014.

Based on the facts, parties' arguments, and applicable law, the court finds the Second Motion to Dismiss should be GRANTED IN PART and DENIED IN PART.

I. BACKGROUND

A. Procedural Background

On May 30, 2014, Plaintiffs Three Legged Monkey, L.P. ("Three Legged Monkey"); 3LM, LLC ("3LM"); and James Michael Armstrong ("Armstrong") filed their Original Petition against the City of El Paso, Texas (the "City"); the El Paso International Airport (the "Airport"); Emma Acosta, in her official and individual capacity as City Representative for District Three of El Paso, Texas and as a private citizen ("Acosta"); John F. Cook, in his capacity as Mayor of the City of El Paso, Texas ("Cook"); Ann Morgan Lilly, in her official and individual capacity as City Representative for District One of El Paso, Texas and as a private citizen ("Lilly"); Susannah M. Byrd, in her official and individual capacity as City Representative for District Two of El Paso, Texas and as a private citizen ("Byrd"); Steve Ortega, in his official and individual capacity as City Representative for District Seven of El Paso, Texas and as a private citizen ("Ortega"); Joyce Wilson, in her official and individual capacity as City Manager of El Paso, Texas and as a private citizen ("Wilson," and collectively, "City Defendants"); Patriot Place, Ltd. ("Patriot Place"); and David Brandt, individually and as Trustee and General Partner of ("Brandt," collectively. Hawkins Plaza and "Defendants"). The Original Petition was amended on June 4, 2014.2

This case was removed from the County Court of Law Number Three of El Paso County, Texas on July 10, 2014, pursuant to 28 U.S.C. §§ 1331 and 1441(a), 28 U.S.C. § 1452(a), and 28 U.S.C. § 1367(a). On July 11, 2014, Patriot Place and Brandt moved to dismiss the plaintiffs' claims and the City Defendants moved to dismiss on July 16, 2014. On November 3, 2014, the

court granted Three Legged Monkey, 3LM, and Armstrong leave to amend their complaint and dismissed the City Defendants' First Motion to Dismiss as moot.⁵ Three Legged Monkey and Armstrong (collectively, "Plaintiffs") filed their Second Amended Complaint on November 10, 2014.⁶ Therein, Plaintiffs withdrew 3LM as a plaintiff to this cause of action and added a claim of **substantive due process** against the City and City Defendants.⁷

2 The court treated Patriot Place and Brandt's First Motion to Dismiss as directed to Plaintiffs' Second Amended Complaint and dismissed Three Legged Monkey's claims for tortious interference and conspiracy to commit tortious interference against Patriot Place and Brandt with prejudice on November 10, 2014.

On November 17, 2014, the City and City Defendants filed their Second Motion to Dismiss, and on December 1, 2014, Plaintiffs filed their Response. The City and City Defendants filed their Reply on December 8, 2014.

B. Factual Background

Plaintiffs allege Defendants conspired to interfere with a contract entered into by Three Legged Monkey and Armstrong for the Hawkins Plaza Shopping Center ("Hawkins Plaza") located at 1550 Hawkins Boulevard, Suites 2-4, El Paso, Texas, 79925. Based on these events, Plaintiffs sued the City for breach of contract; violations of their Fourth Amendment, substantive due process, and equal protection rights; and vicarious liability. Plaintiffs sued all of the City Defendants for violations of their Fourth Amendment, substantive due process, and equal protection rights, as well as vicarious liability. In addition, Plaintiffs sued Acosta, Lilly, Byrd, Ortega, and Wilson for tortious interference with a contract and conspiracy under 42 U.S.C. § 1983 and Texas common law. 12

Plaintiffs assert that Patriot Place entered into a long-term ground lease ("Ground Lease") with the City to rent Hawkins Plaza.¹³ The Ground Lease authorized Patriot Place to sublease particular spaces to various tenants, one of which was Three Legged Monkey.¹⁴ Plaintiffs allege that the City knew and consented to Patriot Place's sublease with Three Legged Monkey beginning in 2003.¹⁵ Armstrong, owner and operator of 3LM, created Three Legged Monkey, a sports bar and restaurant at Hawkins Plaza.¹⁶ On November 28, 2005, Armstrong extended the sublease between Three Legged Monkey and Patriot Place for a period of twenty (20) years ("Sublease").¹⁷

Plaintiffs allege the City subsequently "made

unreasonable and unjustified requests to Three Legged Monkey to comply with city codes." Plaintiffs state Armstrong and Three Legged Monkey responded by "increasing security, reducing occupancy, and changing their business model to offer more food." Plaintiffs further aver that Three Legged Monkey did not violate any government codes, but that "[b]eginning in 2008 and continuing through 2012[,] the City conducted countless raids at Three Legged Monkey ... during its operating hours ... [which] were intended to harass Plaintiffs and resulted in the loss of business and profits." Indeed, Plaintiffs state that the City conducted such a raid at Armstrong's residence, which serves as Three Legged Monkey's office, on February 24, 2011.

Plaintiffs also assert the City took several actions against Three Legged Monkey, including pursuing alleged violations before the Texas Alcoholic Beverage Commission ("TABC"), which ultimately determined that Three Legged Monkey's permit to sell alcoholic beverages should '"not be suspended or cancelled'" on August 29, 2013.²²

*3 A City Council meeting was held on March 1, 2011, at which the contents of a letter addressed to the City and dated April 25, 2010 were discussed.²³ Therein, Plaintiffs allege that Patriot Place noted the following:

[e]ven though such tenant's use is properly-zoned, such tenant's premises are code-compliant, municipal parking requirements and noise limits have been met, and bars have been located at the shopping center with the knowledge and consent of the City for about twenty years, the City wants the bar tenant gone from the shopping center without legal authority to make that happen.24

Plaintiffs further aver that, on March 2, 2011, Cook remarked "Three Legged Monkey was not a 'first class' operation." Plaintiffs contend this statement was the pretextual basis for the City's unanticipated termination of its Ground Lease with Patriot Place, as the Ground Lease requires Patriot Place "to run a 'first class' shopping center." On March 28, 2011, the City sent a Notice of Default and Demand for Cure ("Notice of Default") to Patriot Place, stating that Patriot Place was in default of the Ground Lease for failure to operate Hawkins Plaza as a "first class shopping center."

Patriot Place responded to the City's Notice of Default on April 25, 2011.²⁸ On May 30, 2011, Patriot Place filed a voluntary petition for relief in United States Bankruptcy

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Court under Chapter 11 of the Bankruptcy Code.²⁹ Patriot Place subsequently filed a "Motion for Order Authorizing the Assumption of Commercial Ground Lease with the El Paso International Airport/City of El Paso" ("Motion to Assume Ground Lease") and an "Omnibus Motion for Order Authorizing Assumption of Fifteen Unexpired Leases with Current Tenants of Hawkins Plaza" ("Motion to Assume Tenant Leases") — including Three Legged Monkey — on July 26, 2011 and July 29, 2011, respectively.³⁰

On June 2, 2012, Three Legged Monkey filed its own voluntary petition for relief under Chapter 11, and on June 25, 2012, a Motion to Assume the Shopping Center Lease with Patriot Place.31 According to Plaintiffs, the City and Patriot Place "conspired to reach an agreement to cause the termination of the Sublease" between late 2011 and May of 2012.32 Plaintiffs allege the City, Patriot Place, and Brandt agreed to evict Three Legged Monkey and other "Undesired Tenants" of Hawkins Plaza (hereinafter referred to as the "Settlement Agreement"), but that in actuality, the only existing "Undesired Tenant" at the time was Three Legged Monkey.33 After terminating the Sublease, Patriot Plaza sold Hawkins Plaza to the City for \$2.9 million.34 Plaintiffs further aver that the Settlement Agreement allowed Patriot Place to continue operating Hawkins Plaza and that the sale price was well above its appraised value.35 Patriot Place sent a Notice of Termination to Three Legged Monkey on November 12, 2012 indicating its intent to terminate the Sublease, effective that day.36 However, Patriot Place could not close on the Settlement Agreement until it received approval by the United States Bankruptcy Court.37 On January 11, 2013, the Bankruptcy Court granted Three Legged Monkey the right to assume the Sublease and denied approval of the Settlement Agreement.38 Three Legged Monkey asserts it continued operating its business until November 4, 2013, but that Defendants' actions caused Three Legged Monkey's lost business, lost profits, and eventual closure.39

C. Parties' Arguments

*4 The City and City Defendants move to dismiss Plaintiffs' claims pursuant to Federal Rules of Civil Procedure 12(b)(1) ("Rule 12(b)(1)") and 12(b)(6) ("Rule 12(b)(6)"). 40 Pursuant to Rule 12(b)(1), the City Defendants assert governmental immunity from suit under the Texas Tort Claims Act ("TTCA")*1 and argue Plaintiffs lack standing to allege such a cause of action. 42 Pursuant to Rule 12(b)(6), the City and City Defendants contend Plaintiffs have failed to allege any facts in support of their claims under 42 U.S.C. § 1983 ("section 1983") for substantive due process and equal protection

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violations, and against the City for breach of contract.⁴³ Therefore, they seek dismissal of all of Plaintiffs' requests for relief to include declaratory relief, injunctive relief, damages, fees, and costs for the aforementioned causes of action.⁴⁴

Plaintiffs respond they have alleged sufficient facts in support of their constitutional claims based on the:

(1) deprivation of the **right** to be free of unwarranted search and seizure in violation of the Fourth and Fourteenth Amendments; (2) deprivation of **property rights** in violation of the Plaintiffs' **substantive due process rights** guaranteed by the Fourteenth Amendment; and (3) denial of Plaintiff's [sic] equal protection **rights** as guaranteed by the Fourteenth Amendment.⁴⁵

Plaintiffs "incorporate by reference, in its entirety ... its prior response to the City's claim of lack of standing [and] ... Plaintiff's [sic] breach of contract claims"46 Therein, Plaintiffs asserted Three Legged Monkey has standing to sue for breach of the Ground Lease against the City Defendants because: "(1) the City and Patriot Place consented to a contractual relationship with Three Legged Monkey as a subleasee [sic] party; or (2) intended that Three Legged Monkey benefit from the terms of the Ground Lease, *i.e.*, was a third-party beneficiary."47

II. APPLICABLE LAW

A. Standard for Motion to Dismiss Pursuant to Rule 12(b)(1)

Rule 12(b)(1) allows a party to challenge a federal court's subject matter jurisdiction to preside over a case.⁴⁸ A district court may find lack of subject matter jurisdiction in one of three manners: (1) the complaint by itself; (2) the complaint complemented by undisputed facts evidenced in the record; and (3) the complaint complemented by undisputed facts and the court's determination of disputed facts.⁴⁹ The party asserting jurisdiction bears the burden of proof for a Rule 12(b)(1) motion to dismiss.⁵⁰ Moreover, when a party moves to dismiss based on Rule 12(b)(1) in addition to another Rule 12 defense, the court should first examine the Rule 12(b)(1) jurisdictional challenge before addressing any attack on the merits.⁵¹

*5 "Federal courts are courts of limited jurisdiction; without jurisdiction conferred by statute, they lack the

power to adjudicate claims."⁵² In ruling on a Rule 12(b)(1) motion to dismiss, the court must take all allegations set forth in the complaint as true.⁵³ Only when it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle the plaintiff to relief, should the court grant a motion to dismiss based on lack of subject matter jurisdiction.⁵⁴

B. Standard for Motion to Dismiss Pursuant to Rule 12(b)(6)

Rule 12(b)(6) allows for dismissal of a complaint for "failure to state a claim for which relief can be granted."55 "The central issue is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief."56 To survive a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face."57 "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully."58 "[F]acial plausibility" exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."59 Therefore, a complaint is not required to set out "detailed factual allegations," but does need to provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action."60 Although the court must accept well-pleaded allegations in a complaint as true, it does not afford conclusory allegations similar treatment.61

III. DISCUSSION

As a preliminary matter, the court notes that suits against government officials for actions taken in their official capacities should be treated as suits against the government entity itself.⁶² Therefore, to the extent Plaintiffs have alleged a cause of action against the City Defendants in their official capacities, the court will refer to the claim as one against the City.

A. Rule 12(b)(1)

1. Whether Plaintiffs Lack Standing to Assert Claims Pursuant to Section 1983

*6 Section 1983 does not create **substantive rights**; rather, it imposes liability on anyone who acts under color of state law to deprive a person of any **rights**, privileges, or immunities secured by the Constitution and federal

law.⁶³ Thus, to prevail under section 1983, a claimant must first identify a protected life, liberty, or **property** interest; and second, demonstrate that government action caused the deprivation of that interest.⁶⁴

To establish standing, a plaintiff must demonstrate: (1) an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of, which is fairly traceable to the defendant's challenged action and not the consequence of an independent action by a third party not before the court; and (3) the likelihood that a favorable decision will redress the injury.⁶⁵ The party invoking federal jurisdiction bears the burden of establishing standing.⁶⁶ "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [the court] presume[s] that general allegations embrace those specific facts that are necessary to support the claim."

First, the City contends Plaintiffs have not identified specific or particularized injuries by referring to only one date on which they were subjected to a raid without describing the acts that took place, and by failing to describe what specific injuries occurred as a result of the City's "unreasonable and unjustified requests to Three Legged Monkey to comply with city codes." Second, Plaintiffs have failed to establish a causal connection. And third, Plaintiffs have failed to establish redressability because they merely allege past violations and Three Legged Monkey is no longer an occupant of Patriot Place's facilities. In contrast, Plaintiffs respond they have alleged constitutional claims for:

(1) deprivation of the right to be free from unwarranted search and seizure in violation of the Fourth and Fourteenth Amendments; (2) deprivation of property rights in violation of the Plaintiffs' substantive due process rights guaranteed by the Fourteenth Amendment; and (3) denial of Plaintiff's [sic] equal protection rights as guaranteed by the Fourteenth Amendment.⁷⁰

a. Armstrong's Standing

Armstrong, as the sole shareholder of Three Legged Monkey, does not have standing to sue for claims under section 1983. In *Schaffer v. Universal Rundle Corp.*, the

Fifth Circuit recognized:

[t]he general rule ... that an action to redress injuries to a corporation, whether arising out of contract or tort, cannot be maintained by a stockholder in his own name but must be brought in the name of the corporation, since the cause of action being in the corporation, the stockholder's rights are merely derivative and can be asserted only through the corporation. The general rule is applicable in cases where the individual is the sole stockholder. The rule does not apply in a case where the stockholder shows a violation of duty owed directly to him. That exception to the general rule does not arise, however, merely because the acts complained of resulted in damage both to the corporation and to the stockholder, but is confined to cases where the wrong itself amounts to a breach of duty owed to the stockholder personally.71

*7 This exception does not apply, as Armstrong has not alleged he "sustained identifiable losses as an individual as well as in his corporate role." Therefore, Armstrong cannot pursue claims of constitutional violations for harm done to Three Legged Monkey under section 1983.73

b. Three Legged Monkey's Standing

Despite Armstrong's lack of standing, Three Legged Monkey can maintain a cause of action under section 1983.74

i. Search and Seizure Pursuant to the Fourth Amendment

The Fourth Amendment protects "[t]he **right** of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, [which] shall not be violated, and no warrants shall issue, but upon probable cause" The Fourth Amendment also forbids unreasonable searches and seizures of commercial premises.⁷⁵

Plaintiffs allege that between 2008 and 2012, the City conducted numerous raids on Three Legged Monkey's premises, which culminated in the loss of business and profits. For instance, on February 24, 2011, the El Paso Police Department ("EPPD") and other law enforcement agencies raided Three Legged Monkey's business office, located at 242 Trice, El Paso County, Texas, without probable cause or a warrant. To

*8 The court concludes Three Legged Monkey has standing to sue the City and City Defendants, pursuant to section 1983, for conducting unreasonable searches in violation of the Fourth Amendment. First, Three Legged Monkey has alleged an injury in fact: that the City and City Defendants directed EPPD and other law enforcement agencies to conduct warrantless searches and seizures of Three Legged Monkey and its business office, without probable cause or other justifying circumstances. Second, Three Legged Monkey has alleged this injury caused the loss of business patrons and profits. Third, this injury can be redressed in the form of actual and consequential damages (plus attorney's fees) to compensate Three Legged Monkey.⁷⁸

ii. Substantive Due Process Under the Fourteenth Amendment

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law."79 To maintain a cause of action for a violation of substantive due process, a claimant must show: (1) a property or liberty interest protected by the Fourteenth Amendment; and (2) the deprivation of that right, which is not rationally related to a legitimate government interest.80 "Only if such government action is clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare, may it be declared unconstitutional."81 Courts have recognized substantive due process protections for lessees of real property.82 However, actions for the deprivation of a property right by a lessee are governed by the more stringent "shocks the conscience" standard, rather than the less rigorous "improper motive" inquiry.83

*9 Three Legged Monkey alleges the City acted irrationally and arbitrarily in voting to terminate the Ground Lease and entering into the Settlement Agreement based on pretextual defaults to destroy its business; effectively taking Three Legged Monkey's property without compensation.[№] Rather than address whether the alleged actions were rationally related to a legitimate

government interest, the City has argued Plaintiffs' Second Amended Complaint is "devoid of any specific acts by the City Defendants or specific injuries suffered as a result of such acts." However, this argument is more appropriate in an analysis of whether Three Legged Monkey has adequately stated a claim for relief under Rule 12(b)(6).

Three Legged Monkey alleges the City Defendants treated it differently than other bar and restaurant tenants in Hawkins Plaza, which included raids designed to discourage patrons, an investigation by the TABC, and an enormous settlement with Patriot Place to terminate the Ground Lease and consequently, close Three Legged Monkey. MacCordingly, the only party harmed by these decisions was Three Legged Monkey.

Taking all of its allegations as true, the court finds Three Legged Monkey has standing to pursue a **substantive due process** claim, because Three Legged Monkey has alleged: (1) an injury in fact — the deprivation of its **property rights** as a lessee without a legitimate government interest; (2) caused by the City; (3) which can be redressed by awarding damages.

iii. Equal Protection Under the Fourteenth Amendment

The Equal Protection Clause of the Fourteenth Amendment requires all persons similarly situated to be treated alike. 87 Pleading an equal protection claim "does not require a showing that the city acted with illegitimate animus or ill will."88 However, the plaintiff must allege he "was intentionally treated differently from others similarly situated and there is no rational basis for that treatment."89

Here, Three Legged Monkey alleges it was intentionally targeted by the City and treated differently from other bar and restaurant owners, as well as holders of TABC liquor licenses. The City Defendants allegedly classified Three Legged Monkey as an "Undesired Tenant" in order to shut down the business, which was not rationally related to any purpose or responsibility of the City. Three Legged Monkey asserts these actions were the proximate and producing cause of harm, which it seeks to remedy in the form of damages. As Three Legged Monkey has alleged an injury in fact, causation, and redressability, the court concludes Three Legged Monkey also retains standing to state an equal protection claim against the City.

2. Whether Defendants are Immune from Suit for Claims of Tortious Interference and Conspiracy Pursuant to the

The City Defendants move to dismiss Plaintiffs' tortious interference with contract and conspiracy claims pursuant to the TTCA. Under the TTCA, "if a suit is filed ... against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit." Plaintiffs' claims of tortious interference with a contract and conspiracy to commit tortious interference with a contract are state law claims to which the TTCA applies. As public officials of the City, Acosta, Lilly, Byrd, Ortega, Wilson, and Cook are employees of the City and are being sued for acts committed in their official capacity. Accordingly, they are immune from state law claims arising out of their conduct in their official capacity.

*10 Although the TTCA provides a limited waiver of governmental immunity, this waiver does not extend to suits for intentional torts.⁹⁷ Plaintiffs' claims of tortious interference with a contract and conspiracy are intentional torts.⁹⁸ Therefore, the TTCA does not waive the City Defendants' immunity for acts performed in their official capacity giving rise to Plaintiffs' state law claims of tortious interference with a contract and conspiracy to commit tortious interference with a contract; the court must dismiss these claims for lack of subject matter jurisdiction.

B. Rule 12(b)(6)

1. Section 1983 Claims for Constitutional Violations

To succeed on a claim under section 1983, the plaintiff must "establish that the defendant was either personally involved in the deprivation or that his wrongful actions were causally connected to the deprivation." In Monell v. Department of Social Services of the City of New York, the Supreme Court held that a municipality or local government unit, like any other person," may be sued under section 1983 for monetary, declaratory, or injunctive relief. To state a claim against a municipality, a plaintiff must allege the deprivation of a constitutional or other federally protected **right** that resulted from an official policy, practice, or custom. The Fifth Circuit has defined an official policy as a "policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the

lawmakers have delegated policy-making authority." The policy must be a "deliberate" and "conscious" choice of the municipality. An official practice or custom is defined as "[a] persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy." Further, "[a]ctual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority." In S.

a. Failure to State a Claim Against the City Defendants in their Individual Capacities and as Private Citizens

Before turning to specific constitutional violations, the court will dismiss the City Defendants in their individual capacities and as private citizens, because Plaintiffs have failed to plead sufficient facts to state a claim of constitutional violations under section 1983. *In Ashcroft v. Iqbal*, the Supreme Court held "plaintiff must [in a section 1983 suit] plead that each Government-official defendant, through his own individual actions, has violated the Constitution." The court rejected purposeful discrimination as simply knowledge or awareness of consequences, and emphasized that it implicates a decisionmaker's adoption of a policy "because of, not merely in spite of, its adverse effects upon an identifiable group." 107

*11 Here, Plaintiffs have not identified any specific act by the City Defendants personally. Rather, the complained-of acts were performed in the City Defendants' official capacities in adopting a policy, practice, or custom, which resulted in violations of Three Legged Monkey's constitutional rights. Plaintiffs have failed to allege the City Defendants were personally motivated by adverse effects on Three Legged Monkey. Moreover, Plaintiffs have not explained the distinction of the City Defendants "in their individual capacities" as opposed to "private citizens." All of Plaintiffs' allegations regarding such claims are purely conclusory. Therefore, the court must dismiss the City Defendants in their individual capacities and as private citizens.

b. <u>Unlawful Searches in Violation of the Fourth</u> Amendment

The City argues Three Legged Monkey has failed to allege any facts that the City Defendants adopted a formal policy, practice or custom to violate its Fourth Amendment rights; or to identify the final policymaker who created or condoned raids upon the establishment. However, this argument rests largely on the issue of standing, which the court previously addressed.

Although the court finds Plaintiffs have not stated facts in support of a *policy* adopted by the City Defendants, ¹⁰⁹ it does find that Plaintiffs have enumerated sufficient facts to plead a claim the City Defendants had a custom or practice of directing law enforcement to raid Three Legged Monkey without reasonable suspicion, much less probable cause, that a crime had occurred or was occurring between 2008 and 2012. ¹¹⁰ Plaintiffs allege that in 2009 alone, city officials — including armed, uniformed police officers — raided Three Legged Monkey approximately one hundred (100) times. ¹¹¹ Accordingly, the court finds Three Legged Monkey has sufficiently stated a claim for unreasonable searches of its premises in violation of the Fourth Amendment.

c. <u>Substantive Due Process Under the Fourteenth</u> Amendment

Having concluded that Three Legged Monkey has alleged the existence of a **property** interest, the court will now turn to whether Three Legged Monkey has adequately alleged the City engaged in "arbitrary conduct shocking to the conscience" in depriving it of that interest. In *County of Sacramento v. Lewis*, the Supreme Court emphasized that "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." Conduct that "shocks the conscience" is deemed so brutal and offensive to society that it defies the decencies of civilized society. Notwithstanding, where the complainant alleges an intent to harm, the conduct will likely be considered to shock the conscience.

The City Defendants argue Plaintiffs have not identified an executive action by Cook or Wilson, or a legislative action by Acosta, Lilly, Byrd, or Ortega that is arbitrary or conscience-shocking. However, the court finds Plaintiffs have alleged several actions by the City to deprive Three Legged Monkey of its substantive right to due process: making unreasonable and unjustified requests to Three Legged Monkey to comply with municipal codes; conducting raids between 2008 and 2012 of Three Legged Monkey during its operating hours; pursuing violations with the TABC; and directing meetings to discuss efforts to shut down Three Legged

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Monkey.117

*12 Furthermore, the court finds that Plaintiffs have sufficiently alleged the City Defendants intended to harm Three Legged Monkey by shutting down its operations and causing it to lose business patrons.118 These acts rise to the level of conscious-shocking because, if true, the City Defendants engaged in a deliberate strategy to ensure Three Legged Monkey would no longer operate at Hawkins Plaza. In so doing, the City Defendants ejected Three Legged Monkey from the premises without providing an adequate remedy to compensate Three Legged Monkey for its efforts in securing the Shopping Lease and maintaining a profitable business — a recognized constitutional right. 119 Accordingly, the court finds Three Legged Monkey's substantive due process claim should not be dismissed for failure to state a claim for relief against the City.

d. Equal Protection Under the Fourteenth Amendment

The City argues Plaintiffs do not plead any facts demonstrating Three Legged Monkey was treated differently from similarly situated individuals, or how the City's treatment was not rationally related to a legitimate government interest. ¹²⁰ Rather, they contend Three Legged Monkey's factual allegations indicate it was treated similarly to other bars and nightclubs operating in Hawkins Plaza. ¹²¹

Plaintiffs allege "the City Defendants intentionally targeted Plaintiffs and singled them out from among other operators of bars and restaurants and other holders of TABC liquor licenses." Three Legged Monkey further alleges it was classified as an "Undesired Tenant" of Hawkins Plaza to close its business without any rational basis in law. 123 Indeed, Three Legged Monkey contends:

[t]he other Undesired Tenants were Monaco Entertainment Group, LLC, which never took possession of its premises, and Herb N Legend, which was evicted after a DEA raid and was no longer in possession of its premises as of the date of the Settlement Agreement. Thus, [Three Legged Monkey] was the only existing Undesired Tenant.¹²⁴

If its allegations are true, Three Legged Monkey was intentionally treated differently than other bars and restaurants in Hawkins Plaza, which similarly complied

with city codes. Thus, Three Legged Monkey has adequately alleged differential treatment by the City in violation of the Equal Protection Clause. 125

3. Conspiracy Pursuant to Section 1983

*13 Three Legged Monkey asserts a cause of action for conspiracy under section 1983 against the City, Patriot Place, and Brandt. To adequately plead a claim for conspiracy under section 1983, the claimant must allege facts suggesting: "1) an agreement between the private and public defendants to commit an illegal act, and 2) an actual deprivation of constitutional rights."126 Taking Three Legged Monkey's allegations as true, the court finds the City entered into an agreement with Patriot Place and Brandt to force Three Legged Monkey to close its business; the pretext of which was that Three Legged Monkey was not code-compliant. 127 Because the City did not have legal means to close Three Legged Monkey, it resorted to colluding with Patriot Place to effectively wind down its operations. After an ongoing battle, Patriot Place and Brandt stopped defending Three Legged Monkey and entered into a Settlement Agreement that resulted in Three Legged Monkey no longer occupying the premises at Hawkins Plaza. 128 Furthermore, Three Legged Monkey has stated a claim against the City for violations of its substantive due process and equal protection rights. Therefore, Three Legged Monkey's claim for conspiracy under section 1983 should not be dismissed against the City.

4. Breach of Contract for the Ground Lease

The court previously determined Three Legged Monkey lacks privity of contract and is not an intended third-party beneficiary of the Ground Lease. 129 Accordingly, Three Legged Monkey's claims for breach of contract against the City must be dismissed with prejudice.

5. The Airport

The City argues the Airport is not a separate entity, but rather operates as a department of the City. Plaintiffs do not dispute this assertion. Regardless, Plaintiffs have failed to allege any facts whatsoever to show the Airport is liable for any of Plaintiffs' claims. Therefore, the court concludes the Airport should be dismissed because a suit

against the Airport is really a suit against the City and Plaintiffs have not alleged facts to state a claim for which relief can be granted.

IV. CONCLUSION AND ORDERS

*14 "Defendants' City of El Paso, Texas; El Paso International Airport; Emma Acosta; John F. Cook; Ann Morgan Lil[I]y; Susannah M. Byrd; Steve Ortega; and Joyce Wilson Rule 12(b) Motion to Dismiss Plaintiffs' Second Amended Complaint" [ECF No. 36] is GRANTED IN PART and DENIED IN PART.

Accordingly, the court enters the following orders:

- 1. Plaintiff James Michael Armstrong lacks standing to assert a claim under 42 U.S.C. § 1983 for claims of conspiracy and violations of the Fourth Amendment; substantive due process; and equal protection against the City and City Defendants; and accordingly, these claims are DISMISSED WITH PREJUDICE.
- 2. Plaintiffs James Michael Armstrong and Three Legged Monkey L.P.'s claims for breach of contract, tortious interference with a contract, and conspiracy to commit breach of contract and tortious interference with a contract against the City and City Defendants in their official capacities are **DISMISSED WITH PREJUDICE.**
- 3. Plaintiffs James Michael Armstrong's and Three Legged Monkey L.P.'s claims of breach of contract, tortious interference with a contract, and conspiracy to commit breach of contract and tortious interference with a contract against Defendants Emma Acosta, Ann Morgan Lilly, Susannah M. Byrd, Steve Ortega, and Joyce Wilson in their individual capacities and as private citizens are **DISMISSED WITHOUT PREJUDICE.**
- 4. Plaintiff Three Legged Monkey, L.P.'s claims of conspiracy and violations of the Fourth Amendment; substantive due process; and equal protection

pursuant to 42 U.S.C. § 1983 against Emma Acosta, Ann Morgan Lilly, Steve Ortega, and Joyce Wilson, in their individual capacities and as private citizens are **DISMISSED WITHOUT PREJUDICE.**

- 5. Plaintiff Three Legged Monkey, L.P.'s claim against the City for breach of contract is **DISMISSED WITH PREJUDICE.**
- 6. Defendant El Paso International Airport is **DISMISSED WITH PREJUDICE.**
- 7. Plaintiff Three Legged Monkey, L.P. has standing and has stated claims for relief against the City pursuant to 42 U.S.C. § 1983 for: unreasonable searches under the Fourth Amendment, substantive due process under the Fourteenth Amendment; equal protection under the Fourteenth Amendment; and conspiracy.
- 8. Defendants City of El Paso, Texas; Emma Acosta, in her official capacity as City Representative for District Three of El Paso, Texas; John F. Cook, in his official capacity as Mayor of the City of El Paso; Ann Morgan Lilly, in her official capacity as Representative for District One of El Paso, Texas; Susannah M. Byrd, in her official capacity as City Representative of District Two of El Paso, Texas; Steve Ortega, in his official capacity as City Representative of District Seven of El Paso, Texas; and Joyce Wilson, in her official capacity as City Manager of El Paso, Texas SHALL file an answer to "Plaintiffs' Second Amended Complaint" [ECF No. 30] by January 22, 2015.

SO ORDERED.

All Citations

Slip Copy, 2015 WL 12916439

Footnotes

- "Joint Notice of Removal by Defendants City of El Paso, Texas; El Paso International Airport; Emma Acosta; John F. Cook (in his official capacity); Ann Morgan Lilly; Susannah M. Byrd; Steve Ortega; Joyce Wilson; Patriot Place, Ltd.; and David Brandt" ("Notice of Removal"), Ex. C-Part 1, at 49, "Plaintiffs' Original Petition," ECF No. 1, filed July 10, 2014
- ² Id., Ex. C-Part 1, at 72, "Plaintiffs' First Amended Original Petition" ("Amended Complaint"), ECF No. 1-3.

- See Defs.' Notice Removal 2; see also "Motion to Dismiss Plaintiff's [sic] First Amended Original Complaint of Patriot Place, Ltd. and David Brandt," ECF No. 2, filed July 11, 2014; "Original Answer of Patriot Place, Ltd. and David Brandt to Plaintiff's [sic] First Amended Original Complaint," ECF No. 3, filed July 11, 2014; "Defendants' City of El Paso, Texas; El Paso International Airport; Emma Acosta; John F. Cook; Ann Morgan Lil[i]y; Susannah M. Byrd; Steve Ortega; and Joyce Wilson Rule 12(b) Motion to Dismiss" ("City Defendants' First Motion to Dismiss"), ECF No. 6, filed July 16, 2014.
- See "Motion to Dismiss Plaintiffs' First Amended Original Complaint of Patriot Place, Ltd. and David Brandt" ("Patriot Place and Brandt's First Motion to Dismiss"), ECF No. 2; City Defs.' First Mot. Dismiss.
- ⁵ "Order Granting Plaintiffs' Motion for Leave to File Plaintiffs' Second Amended Complaint," at 9-10, ECF No. 29.
- ⁶ "Plaintiff's [sic] Second Amended Complaint" ("Second Amended Complaint"), ECF No. 30.
- ⁷ See Pls.' Second Am. Compl. 1, 16-17 ¶¶ 70-75.
- "Order Granting Motion to Dismiss Plaintiff's First Amended Original Complaint of Patriot Place, Ltd. and David Brandt," at 14-15, ECF No. 31.
- 9 Pls.' Second Am. Compl. 5 ¶ 18.
- 10 *Id.* at 13 ¶¶ 57-59, 14-18 ¶¶ 65-81, 23 ¶ 106.
- 11 *Id.* at 14-18 ¶¶ 65-81, 23 ¶ 106.
- 12 *Id.* at 13-14 ¶¶ 60-64, 21-23 ¶¶ 98-105.
- 13 *Id.* at 5 ¶ 18.
- ¹⁴ *Id.* ¶ 20.
- ¹⁵ Pls.' Second Am. Compl. 6 ¶¶ 21, 24.
- ¹⁶ *Id.* ¶¶ 22-23.
- 17 *Id.* ¶ 25.
- ¹⁸ *Id.* at 7 ¶ 27.
- 19 Id.
- ²⁰ *Id.* ¶ 29.
- Pls.' Second Am. Compl. 7 ¶ 29.
- 22 Id. at 7-8 ¶ 30.
- 23 Id. at 9 ¶ 33-34.

- 24 Id. ¶ 34. Plaintiffs also state Maria Mejia, who served as Interim District 3 City of El Paso Representative at the time these events took place, testified that she attended meetings where some of the City Defendants discussed how to shut down Three Legged Monkey. Id. at 8 ¶ 32. 25 Id. at 9 ¶ 35. 26 Pls.' Second Am. Compl. 9 $\P\P$ 36-37. 27 Id. ¶ 37. 28 Id. at 10 ¶ 39. 29 Id. ¶ 41. 30 Id. ¶ 42. 31 Id. ¶ 43. 32 Pls.' Second Am. Compl. 11 ¶ 44. 33 Id. ¶ 45. 34 Id. ¶ 46. 35 Id. ¶¶ 47-48.

Id. at 12 ¶ 50.

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- 38 Pls.' Second Am. Compl. 12 ¶¶ 54-55.
- 39 Id. at 12-13 ¶ 56.

Id. ¶ 51.

- 40 City Defs.' Second Mot. Dismiss 4 ¶ 10.
- 41 Codified at Tex. Civ. Prac. & Rem. Code § 101, et seq.
- 42 City Defs.' Second Mot. Dismiss 4 ¶ 10.
- 43 Id. at 4-5 ¶ 10.
- 44 Id. at 5 ¶ 10.
- 45 Pls.' Resp. 6 ¶ 14 (citing Pls.' Second Am. Compl. 15-18 ¶¶ 65-81).

- Id. at 14 ¶ 25. See "Plaintiffs' Response to Defendants Patriot Place, Ltd. and David Brandt's Motion to Dismiss Plaintiffs' First Amended Original Complaint," ECF No. 19, filed Oct. 10, 2014; "Plaintiffs' Response to Defendants' City of El Paso, Texas; El Paso International Airport; Emma Aco[s]ta; John F. Cook; Ann Morgan Lilly; Susannah M. Byrd; Steve Ortega; and Joyce Wilson Rule 12(b) Motion to Dismiss" ("Response to First Motion to Dismiss"), ECF No. 24, filed Oct. 17, 2014.
- 47 Pls.' Resp. First Mot. Dismiss 16 ¶ 25.
- ⁴⁸ Fed. R. Civ. P. 12(b)(1).
- 49 Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001) (citing Barrera—Montenegro v. United States, 74 F.3d 657, 659 (5th Cir. 1996)).
- ⁵⁰ *Id.*
- 51 Id. (citing Hitt v. City of Pasadena, 561 F.2d 606, 608 (5th Cir. 1977) (per curiam) (unpublished)).
- In re FEMA Trailer Formaldehyde Prods. Liab. Litig. (Miss. Plaintiffs), 668 F.3d 281, 286 (5th Cir. 2012) (citing Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994); Stockman v. Fed. Election Comm'n, 138 F.3d 144, 151 (5th Cir. 1998)).
- 53 Saraw P'ship v. United States, 67 F.3d 567, 569 (5th Cir. 1995) (citing Garcia v. United States, 776 F.2d 116, 117 (5th Cir. 1985)).
- Ramming, 281 F.3d at 161 (citing Home Builders Ass'n of Miss., Inc. v. City of Madison Miss., 143 F.3d 1006, 1010 (5th Cir. 1998)).
- ⁵⁵ Fed. R. Civ. P. 12(b)(6).
- Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 313 (5th Cir. 2002) (internal quotation marks and citation omitted); see also In re Katrina Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir. 2007). The City Defendants' reliance on Colle v. Brazos County, Texas is misplaced, because the Supreme Court rejected a heightened pleading standard for complaints alleging violations of section 1983 in Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit. Compare Colle, 981 F.2d 237, 243 (5th Cir. 1993), with Leatherman, 507 U.S. 163, 168 (1993).
- ⁵⁷ Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).
- ⁵⁸ Ashcroft v. Igbal, 556 U.S. 662, 678 (2009).
- ⁵⁹ *Id.* (citing *Twombly*, 550 U.S. at 556).
- 60 Twombly, 550 U.S. at 555.
- See Kaiser Aluminum & Chem. Sales, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982) (citing Associated Builders, Inc. v. Ala. Power Co., 505 F.2d 97, 100 (5th Cir. 1974)).
- 62 Kentucky v. Graham, 473 U.S. 159, 165-66 (1985).
- Blessing v. Freestone, 520 U.S. 329, 340 (1997) (internal citation omitted).
- San Jacinto Sav. & Loan v. Kacal, 928 F.2d 697, 700 (5th Cir. 1991) (citing Baker v. McCollan, 443 U.S. 137, 140 (1979)).

- 65 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations omitted).
- 66 Id. at 561 (internal citation omitted).
- 67 *Id.* (internal citation and quotation marks omitted).
- 68 Mot. Dismiss Second Am. Compl. 6 ¶ 13.
- 69 *Id.* at 6-7 ¶¶ 14-15.
- Resp. City Defs.' Second Mot. Dismiss 6 ¶ 14.
- ⁷¹ 397 F.2d 893, 896 (5th Cir. 1968) (internal citations omitted).
- McDonald v. Bennett, 674 F.2d 1080, 1086 (5th Cir. 1982) (distinguishing Schaffer where plaintiff-shareholder suffered private losses apart from corporate harm); see also Yousef v. Falcon, No. 13-0542, 2013 WL 6816707, at *2 (W.D. La. Dec. 20, 2013) (concluding shareholder lacked standing to bring a section 1983 action where limited liability company in which he owned shares "sued, in the same complaint and on the same theories, for the same harm"); Mendoza v. I.N.S., 559 F. Supp. 842, 849 (W.D. Tex. 1982) (finding bar owners had shown direct harm apart from the bar's Fourth Amendment rights violations, in the form of unreasonable interference with business).
- See, e.g., Diva's Inc. v. City of Bangor, 411 F.3d 30, 42 (1st Cir. 2005) (holding corporate shareholder lacked standing under section 1983 to sue for injury to corporation based on First and Fourth Amendment violations); Pothoff v. Morin, 245 F.3d 710, 716-17 (8th Cir. 2001) (shareholder lacked standing to sue municipal port authority under section 1983 for terminating lease agreement where he failed to allege he "suffered a direct, nonderivative injury"); Gregory v. Mitchell, 634 F.2d 199, 202 (5th Cir. 1981) (affirming dismissal of section 1983 claims by individual shareholders for bank's deprivation of rights, as only the bank allegedly suffered injury).
- See Gregory, 634 F.2d at 202 (recognizing the bank had standing to sue for injury under section 1983, but not its individual stockholders); see also Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc., 368 F.3d 1053, 1060 (9th Cir. 2004) (internal citations and quotation marks omitted) (declaring "if a corporation can suffer harm from discrimination, it has standing to litigate that harm").
- New York v. Burger, 482 U.S. 691, 699 (1987) ("An owner or operator of a business thus has an expectation of privacy in commercial **property**, which society is prepared to consider to be reasonable.").
- ⁷⁶ Pls.' Second Am. Compl. 7 ¶ 29.
- Id. at 15-16 ¶¶ 65-68. Plaintiffs indicate this address is also Armstrong's home, which affords more protection from unreasonable searches and seizures than a commercial enterprise. See Payton v. New York, 445 U.S. 573, 587 (1980) (clarifying that absent a warrant or exigent circumstances, a non-consensual search of a home is presumptively unreasonable). Because the court has already determined that Armstrong seeks relief under section 1983 for the same harm based on the same legal theories as Three Legged Monkey, the court will not construe this alleged search as one of Armstrong's home. The court is also cognizant that commercial property employed in a "closely regulated industry" does not enjoy the same constitutional protection. Burger, 482 U.S. at 702-03 (explaining the standard of reasonableness for warrantless inspections of businesses operating within a closely regulated industry). Notwithstanding, the City and City Defendants do not indicate these alleged raids were conducted pursuant to a regulatory enforcement scheme; therefore, the court will not assess Three Legged Monkey's standing as a commercial enterprise in a closely regulated industry, such as the liquor industry. See, e.g., Club Retro, L.L.C. v. Hilton, 568 F.3d 181, 197 (5th Cir. 2009) (analyzing plaintiff as a commercial establishment within the liquor industry, which it deemed a closely regulated industry).
- The court is not persuaded that Three Legged Monkey's injury cannot be redressed because it is not an occupant of Hawkins Plaza. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 109 (1998) (internal quotation marks and citation

omitted) (emphasis added) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding *injunctive relief*... if unaccompanied by any continuing, present adverse effects."); *Carey v. Piphus*, 435 U.S. 247, 256-57 (1978) ("To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional **rights**, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages."); *see also J & B Entm't v. City of Jackson, Miss.*, 720 F. Supp. 2d 757, 769 (S.D. Miss. 2010) (holding owners of exotic dance club were entitled to recover lost profits during period of wrongful closure by the city).

- 79 U.S. Const. amend. XIV.
- Simi Inv. Co., Inc. v. Harris Cnty., Tex., 236 F.3d 240, 250-51 (5th Cir. 2000); Honore v. Douglas, 833 F.2d 565, 568 (5th Cir. 1987).
- FM Props. Operating Co. v. City of Austin, 93 F.3d 167, 174 (5th Cir. 1996) (internal citations and quotation marks omitted).
- See Energy Mgmt. Corp. v. City of Shreveport, 467 F.3d 471, 481 (5th Cir. 2006) (internal citation and quotation marks omitted) (finding plaintiff-lessee had a "legally protected **property right** to exploit its mineral interests"); Cross Continent Dev., LLC v. Town of Akron, Colo., 742 F. Supp. 2d 1179, 1188 (D. Colo. 2010) (determining that Colorado state law has impliedly recognized that commercial leases are protected **property** interests); Nicolette v. Caruso, 315 F. Supp. 2d 710, 722 (W.D. Pa. 2003) (recognizing that "[a]s a lessee of real **property**, plaintiff meets the first requirement of stating a **substantive due process** claim, a fundamental **property** interest worthy of **substantive due process** protection"); accord Assocs. in Obstetrics & Gynecology v. Upper Merion Twp., 270 F. Supp. 2d 633, 655-56 (E.D. Pa. 2003).
- United Artists Theatre Circuit, Inc. v. Twp. of Warrington, PA, 316 F.3d 392, 401 (3d Cir. 2003) (internal citations omitted) (announcing the "shocks the conscience" standard applies equally in land use cases); Quickie Chicki, Inc. v. Sexton, 194 F. App'x 259, 261 (5th Cir. 2006) (per curiam) (unpublished) (holding sheriff's actions in confiscating immovable property did not "shock the conscience" or infringe upon fundamental rights, because they were rationally related to the government's interest in maintaining the property pending the completion of the state court proceeding).
- ⁸⁴ Pls.' Second Am. Compl. 16-17 ¶¶ 73-74.
- See City & City Defs.' Second Mot. Dismiss 6 ¶ 13.
- ⁸⁶ Pls.' Second Am. Compl. 7-8 ¶¶ 29-30, 11 ¶ 47.
- 87 Rolf v. City of San Antonio, 77 F.3d 823, 828 (5th Cir. 1996) (internal citation omitted).
- 88 Lindquist v. City of Pasadena, 525 F.3d 383, 387 (5th Cir. 2008).
- 89 Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).
- 90 Second Am. Compl. 17-18 ¶ 79.
- 91 *Id.* at 18 ¶ 80.
- 92 *Id.* at 18 ¶ 82, 24 ¶ 110.
- 93 Tex. Civ. Prac. & Rem. Code § 101.106(e).
- See, e.g., Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc., 29 S.W.3d 74, 77 (Tex. 2000) (listing the elements to state a claim for tortious interference with a contract as: "(1) an existing contract subject to interference, (2) a willful and

- intentional act of interference with the contract, (3) that proximately caused the plaintiff's injury, and (4) caused actual damages or loss"); Four Bros. Boat Works, Inc. v. Tesoro Petrol. Cos., Inc., 217 S.W.3d 653, 680-81 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (explaining conspiracy is a derivative tort and must be predicated on an underlying tort).
- See Tex. Bay Cherry Hill, L.P. v. City of Fort Worth, 257 S.W.3d 379, 399 (Tex. App.—Ft. Worth 2008, no pet.) (construing city council member as an "employee" under the TTCA).
- See Pearlman v. City of Fort Worth, 400 F. App'x 956, 959 (5th Cir. 2010) (per curiam) (unpubished) (affirming dismissal of state law claims against city employee for acts performed in his official capacity under the TTCA); Alexander v. Walker, 435 S.W.3d 789, 791 (Tex. 2014) (internal quotation marks and citation omitted) (discussing the TTCA's purpose in dismissing suits against employees in their official capacity, because it "actually seeks to impose liability against the governmental unit rather than on the individual specifically named").
- 97 Tex. Civ. Prac. & Rem. Code § 101.057(2); Goodman v. Harris Cnty., 571 F.3d 388, 394 (5th Cir. 2009); Tex. Dep't of Crim. Justice—Cnty. Justice Assist. Div. v. Campos, 384 S.W.3d 810, 813 (Tex. 2012).
- See In re Cantu, 389 F. App'x 342, 345 (5th Cir. 2010) (per curiam) (noting that "tortious interference with contract" is an intentional tort); *Triplex Commc'ns, Inc. v. Riley,* 900 S.W.2d 716, 719 (Tex. 1995) (stating that "civil conspiracy requires specific intent").
- ⁹⁹ James v. Tex. Collin Cnty., 535 F.3d 365, 373 (5th Cir. 2008).
- ¹⁰⁰ 436 U.S. 658, 689 (1978).
- 101 *Id.* ("[A] municipality cannot be held liable *solely* because it employs a tortfeasor or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.").
- 102 Bennett v. City of Slidell, 735 F.2d 861, 862 (5th Cir. 1984) (per curiam).
- 103 City of Canton, Ohio v. Harris, 489 U.S. 378, 379 (1989).
- 104 Bennett, 735 F.2d at 862.
- 105 *ld*.
- 106 Igbal, 556 U.S. at 676.
- 107 *Id.* at 681 (internal quotation marks and citation omitted).
- City Defs.' Second Mot. Dismiss 11 ¶ 25.
- See Colle, 981 F.2d at 245 ("A plaintiff may not infer a policy merely because harm resulted from some interaction with a governmental entity.").
- 110 Pls.' Second Am. Compl. 15 ¶ 67.
- 111 Id.; see also Donovan v. Dewey, 452 U.S. 594, 599 (1981) ("[W]arrantless inspections of commercial **property** may be constitutionally objectionable if their occurrence is so random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his **property** will from time to time be inspected by government officials.").
- 112 Cnty. of Sacramento v. Lewis, 523 U.S. 833, 836 (1998).

- 113 Id. at 846 (internal quotation marks and citation omitted).
- Rochin v. California, 342 U.S. 165, 172-73 (1952) (finding forced stomach pumping to shock the conscience and infringe upon one's **substantive due process rights**).
- Lewis, 523 U.S. at 849 (internal citation omitted).
- City & City Defs.' Second Mot. Dismiss 12-13 ¶ 30.
- ¹¹⁷ Pls.' Second Am. Compl. 7-8 ¶¶ 27-32.
- See id.; see also Daniels v. Williams, 474 U.S. 327, 331 (1986) ("Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty or property.") (emphasis in original).
- See, e.g., Soundview Assocs. v. Town of Riverhead, 725 F. Supp. 2d 320, 338 (E.D.N.Y. 2010) (finding plaintiff's allegations that defendants' actions were arbitrary, conscience-shocking, or oppressive in the constitutional sense, were sufficient to withstand a motion to dismiss, where plaintiff alleged defendants arbitrarily extinguished plaintiff's clearly established **rights** to build a health spa under a special permit and then unlawfully threatened plaintiff into abandoning its permit **rights**).
- 120 City & City Defs.' Mot. Dismiss 13 ¶ 32.
- 121 *Id.* at 13-14 ¶ 32.
- 122 *Id.* at 17-18 ¶ 79.
- 123 *Id.* at 18 ¶¶ 80-81.
- ¹²⁴ Pls.' Second Am. Compl. 11 ¶ 45 n.11.
- See, e.g., Vill. of Willowbrook, 528 U.S. at 565 (holding allegations that the Village of Willowbrook intentionally demanded a 33-foot easement as a condition of connecting plaintiff's **property** to the municipal water supply, where other similarly situated **property** owners were only required to produce a 15-foot easement, to be sufficient to state a claim for relief under the traditional equal protection analysis); *Mercado Azteca, LLC v. City of Dali,* No. 3:03-CV-1145-B, 2004 WL 2058791, at *19 (N.D. Tex. Sept. 14, 2004) (finding plaintiff pled enough facts to state claim that the City of Dallas worked behind the scenes to advance a competitor and thwart plaintiff, in violation of the Equal Protection Clause).
- Cinel v. Connick, 15 F.3d 1338, 1343 (5th Cir. 1994) (internal citations omitted); see also Four Bros. Boat Works, 217 S.W.3d at 668 ("[T]o prevail on a civil conspiracy claim, the plaintiff must show the defendant was liable for some underlying tort.").
- But see Pls.' Second Am. Compl. 9 ¶ 34 (stating "[e]ven though such tenant's use is properly zoned, such tenant's premises are code-compliant, municipal parking requirements and noise limits have been met, and bars have been located at the shopping center with the knowledge and consent of the City for about twenty years, the City wants the bar tenant gone from the shopping center without legal authority to make that happen"); see also id. at 8 ¶ 32 (referring to Ms. Mejia's testimony that she was not aware of any violations by Three Legged Monkey, despite the City Defendants' discussions to terminate its operations).
- See, e.g., Howard Gault Co. v. Tex. Rural Legal Aid, Inc., 848 F.2d 544, 555 (5th Cir. 1988) (finding agricultural growers' activities, which "arose out of deep-seated community hostility" to striking farm workers, to be "heavy participation" because of intense involvement with the state, attorney general, and county sheriff where growers acted

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on advice of state actors); *cf. Tebo v. Tebo*, 550 F.3d 492, 497 (5th Cir. 2008) (affirming dismissal of section 1983 conspiracy claim at summary judgment stage where plaintiff did not provide evidence that private party defendants agreed to work with state actors to have plaintiff illegally committed); *Hey v. Irving*, 161 F.3d 7, at *3 (5th Cir. 1998) (per curiam) (unpublished table decision) (declaring "plaintiffs' bare conclusory allegation that '[a]II three defendants demonstrated a meeting of the mind' absent any specific facts showing that the defendants reached an agreement to violate their *rights*, is not sufficient to plead a § 1983 conspiracy"); *Polacek v. Kemper Cnty., Miss.*, 739 F. Supp. 2d 948, 953 (S.D. Miss. 2010) (determining allegations that private defendants reported false information to police officers, which officers accepted as true because of defendant pharmaceutical company's wealth and prestige, to be conclusory); *Lovoi v. F.B.I.*, No. 99-3563, 2000 WL 33671769, at *2 (E.D. La. Mar. 31, 2000) (concluding newspaper clippings of alleged criminal activities by defendants to be unsubstantiated allegations that any of the defendants entered into an agreement).

See "Order Granting Motion to Dismiss Plaintiff's First Amended Original Complaint of Patriot Place, Ltd. and David Brandt," at 9-11, ECF No. 31.

City Defs.' Second Mot. Dismiss 2 n.1.

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EXHIBIT G

KeyCite Yellow Flag - Negative Treatment
Distinguished by Joglo Realties, Inc. v. Seggos, E.D.N.Y., August 24,
2016

2008 WL 3978208

Only the Westlaw citation is currently available.

United States District Court,

E.D. New York.

Frank SLOUP, Plaintiff,

v.

Alan LOEFFLER, individually and in his official capacity as a Town of Islip Employee, Town of Islip, and Craig Pomroy, individually and in his official capacity as a Town of Islip Employee, Defendants.

No. 05-CV-1766 (JFB)(AKT). | Aug. 21, 2008.

Attorneys and Law Firms

Lawrence E. Kelly, Esq. of Glynn Mercep and Purcell, LLP, Stony Brook, NY, for Plaintiff.

Jessica D. Klotz, Esq. of Lewis, Johs, Avallone, Aviles & Kaufman, LLP, Melville, NY, for the individual defendants.

Erin A. Sidaras, Esq., of the Town Attorney's Office, Islip, NY, pro se.

MEMORANDUM AND ORDER

JOSEPH F. BIANCO, District Judge.

*1 On April 7, 2005, pursuant to 42 U.S.C. § 1983, plaintiff Frank Sloup ("plaintiff" or "Sloup") brought this action against defendants Alan Loeffler, individually and in his official capacity as a Town of Islip employee ("Loeffler") and Craig Pomroy, individually and in his official capacity as a Town of Islip employee ("Pomroy") (collectively, the "individual defendants"), as well as the Town of Islip ("Islip") (collectively, "defendants"), alleging that defendants violated plaintiff's rights under the First and Fourteenth Amendments of the United States Constitution. ¹ Specifically, Sloup is a commercial fisherman, and the action arises out of a summons he received from Pomroy on June 9, 2004 regarding certain

fishing equipment plaintiff had placed in the waters of Islip. The individual defendants and Islip now move, separately, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons set forth below, defendants' motions are granted in part and denied in part. In particular, defendants' motions are granted with respect to Sloup's First Amendment claims and denied on all other grounds. ²

I. FACTS

The Court has taken the facts set forth below from the parties' depositions, affidavits, and exhibits, and from the parties' respective Rule 56.1 statements of facts. ³ Upon consideration of a motion for summary judgment, the Court shall construe the facts in the light most favorable to the non-moving party. *See Capobianco v. City of New York*, 422 F.3d 47, 50 (2d Cir.2001). Unless otherwise noted, where a party's 56.1 statement is cited, that fact is undisputed or the opposing party has pointed to no evidence in the record to contradict it.

A. Introduction

(1) Sloup

Sloup has been a "bayman," or commercial fisherman, since 1953. (Sloup. Dep. at 17, 24.) In 1999, he incorporated a commercial fishing business called Crabs Unlimited, LLC ("Crabs Unlimited"). (Sloup Dep. at 17.)

a. Sloup's Fishing Procedures

Since 2002, Sloup has been "involved in catching eels, conch, fish, crabs, killies, which are minnows, clams, scallops, [and] different bait fish...." (Sloup. Dep. at 24.)

In particular, plaintiff catches eels and crabs using traps or pots. (Sloup Dep. at 24.) For instance, an eel trap is three feet long and contains bait to "attract[]" the eels. (Sloup Dep. at 25.) Further, plaintiff has testified regarding the means by which he indicates whether a trap is in the water: "Depending on where I'm fishing and the time of year, sometimes there is a single buoy, float buoy, that marks where the pot is on the water, and sometimes I put them

on the water without a buoy on them, with a weight on one end, and I drag it up." (Sloup Dep. at 25.) In addition, plaintiff personalizes the buoys in order to distinguish them from those of other fishermen. (Sloup Dep. at 26.)

Plaintiff testified that, in an average season, he uses "50 killi pots, 800 crab pots, 500 conch pots, 400 eel pots, and 120 blow fish pots." (Sloup Dep. at 240.) As of June 9, 2004, at least half of plaintiff's eel pots were in the waters of Islip. (Sloup Dep. at 243.) In particular, he had placed pots in the following portions of Islip: "Nichols creek ... Champlin's creek, at the very mouth of Orowoc creek, Awixa creek, and ... the Bay Shore cove...." (Sloup Dep. at 244.)

*2 During the relevant time period, Sloup held a Special Permit to fish for crabs from New York State. (Pl.'s 56.1 ¶ 54.) According to plaintiff, he also held a Commercial Fishing Permit from New York State. (Remmer Aff. ¶ 19.)

(2) Pomroy

As of 2004, Pomroy was an Islip Harbor Master. (Pomroy Dep. at 76.) As such, Pomroy explained, his duties were to "handle any paperwork that was outstanding, answer the phones, take any complaints, just you know, mostly clerical duties like that." (Pomroy Dep. at 78.) In addition, depending on the "manpower" available on a given day, Pomroy might also be responsible for leaving the office to "deal with [a] complaint." (Pomroy Dep. at 78.)

(3) Loeffler

Loeffler was Pomroy's supervisor, (Loeffler Dep. at 109), but Loeffler's precise professional position is a matter of dispute among the parties. According to Loeffler, he was an Islip "Harbor Master" between 1974 and 2005 and, sometime prior to 2004, was awarded the title "Chief Harbor Master." (Loeffler Dep. at 54.) However, in their response to Pl.'s 56.1, the individual defendants state that Loeffler "described his command as the 'Islip Town Harbor Police.' "(Indiv. Defs.' 56.1 Resp. ¶ 11.) According to Sloup, therefore, Loeffler's "true position" is uncertain. (Pl.'s 56.1 Resp. ¶ 82.) Plaintiff notes, for instance, that the title "Chief Harbor Master" does not appear in the Islip Town Code and states that defendants have, at times, referred to Loeffler as the "Chief of Harbor

Police" or "Chief of Marine Law Enforcement Harbor Police." (Pl.'s 56.1 Resp. ¶ 25.)

In any event, Loeffler has testified that he was responsible for "[g]eneral supervision over the members of the division, administrative responsibilities, assuring that vendors were paid." (Loeffler Dep. at 103.) At his deposition, Loeffler agreed that he also "share[d] the knowledge of federal, state and local laws governing fishing, clamming and boating in local waters" with his subordinates. (Loeffler Dep. at 103.) Specifically, Loeffler agreed that his job responsibilities included training his subordinates. (Loeffler Dep. at 92.)

(4) The Regulation of Fishing

Pursuant to *Sloup v. Islip*-and as counsel for defendants agreed at oral argument-Islip does not have the "legislative power to regulate fishing in public waters." 356 N.Y.S.2d 742, 745 (Suffolk Cty.1974). Rather, such power rests in New York State. *Id.* at 745-46.

However, Islip is legally authorized to regulate "navigational hazards" within the waters of Islip. (Defs.' $56.1 \ \P \ 1.)^4$ Specifically, pursuant to Islip Town Code 37-52 ("Section 37-52"),

Any vessel or floating or submerged object which becomes a menace to navigation or unseaworthy or sinks, grounds or otherwise becomes incapable of navigation shall immediately be removed or restored to navigable condition by the owner or operator thereof at his own expense.

* * *

In the event that a vessel or obstruction described in § 37-56A or B above is not immediately removed or restored to navigable condition, the Harbor Master shall notify the owner, either by certified mail or personally, of the condition of the vessel, floating object or obstruction. The owner shall have 72 hours after receipt of notification to remove or restore the vessel, floating object or obstruction unless the Harbor Master shall determine that the vessel, floating object or obstruction is an immediate hazard, in which case he

may either immediately remove it or specify a lesser time for the owner to comply.

*3 Islip Town Code §§ 37-52A, C. Further, the Islip Town Code defines "floating object" to include "fishing buoys." *See* Islip Town Code § 37-51.

B. Sloup's Contacts With Loeffler in the 1990s

According to Sloup, Loeffler approached him twice in the 1990s regarding certain of plaintiff's traps that Loeffler perceived as a threat to navigation. Plaintiff stated as follows regarding these two incidents:

On both occasions, [Loeffler] alleged that he had gotten a call complaining about a trap. On both occasions, I moved the one trap. In one situation, in Bay Shore, I was setting an eel trap with no buoy in 14 feet of water. Alan Loeffler stated "I want you to get that pot out of there, it's a hazard to navigation. I responded that it was 14 feet of water, that I never had a problem with a pot I placed there, it is a safe place to put the pot. The pot was weighted. Alan Loeffler said "Either you move it or we're going to move it" The discussion got heated, and Alan Loeffler pointed at me and said "If it's the last thing I do, I'm going to get you and your buoys out of this bay."

(Sloup Aff. ¶ 50.) As discussed in greater detail *infra*, defendants denied at oral argument that Loeffler ever made such a threat to plaintiff.

C. The Events of June 9, 2004

As of June 9, 2004, Sloup had placed eight or nine crab pots marked with buoys on the East side of Champlin's Creek in Islip, and thirty to thirty-three crab pots marked with buoys on two double rows on the West side of Champlin's Creek. (Defs.' 56.1 ¶ 21.)

(1) McCann's Alleged Complaint and Pomroy's Ensuing Investigation

According to Pomroy, on June 9, 2004, he had a telephone conversation with a boater named McCann, during which McCann lodged a complaint regarding the waters in Champlin's Creek. (Pomroy Dep. at 76.) In particular, a Complaint Report completed by Pomroy that day (the

"Complaint Report") describes McCann's complaint as follows: "Above compl reported crab traps & buoys creating a hazard at [Champlin's Creek]. States there are so many, it is difficult for two boats to pass one another." (See Complaint Report.)

According to Pomroy, he proceeded to Champlin's Creek and observed "there being a lot of hazards in the water that would make it difficult to operate a boat." (Pomroy Dep. at 85.) However, he also testified: "Whether or not I specifically tried to relate it for being difficult for two boats to pass, I don't think I saw it-looked at it in that capacity." (Pomroy Dep. at 85.) Pomroy testified that he understood a "hazard" to be "something in the way that would be-something that would prevent running a-a course-you know, running my course through the waterway to get from where I was to where I wanted to get without having some sort of problem with whatever it was that was in the waterway in front of me." (Pomroy Dep. at 86.) Pomroy also took photographs of these alleged hazards when he investigated the complaint. (See Defs.' Exh. U.)

*4 The question of whether Sloup's fishing equipment actually posed a hazard to navigation on June 9, 2004, pursuant to the Islip Town Code, is a subject of complete dispute among the parties. (Compare Defs.' 56.1 ¶¶ 15 and 18 (stating that photographs Pomroy took, "taken in totality, showed the hazards he observed") with Pl.'s 56.1 Resp. ¶¶ 14-15, 17, and Sloup Aff. ¶ 14 ("All they can say as to Champlin Creek is that in an area the size of over 41 football fields with end zones and room on the sides for the teams, fields which can only be legally traveled by a motor boat at a walking pace (4 miles per hour), 41 brightly colored buoys the size of a very large human head present a menace to navigation. That is one football helmet per football field, supposedly creating a hazard to navigation for people moving at the pace of a dog show best of breed walkabout.").

(2) Pomroy's Conversations With Loeffler

a. Pomroy's Testimony

Pomroy testified that he had several conversations with Loeffler on June 9, 2004, (Pomroy Dep. at 142), including an initial conversation about McCann's complaint. (Pomroy Dep. at 143.) Pomroy did not specifically recall

receiving direction from Loeffler regarding the complaint during that conversation, except "to look into the complaint." (Pomroy Dep. at 143.) Further, after Pomroy went to Champlin's Creek, he had another conversation with Loeffler, during which Pomroy informed Loeffler that "there were numerous buoys in the creek that were creating a hazard-and that … the complaint was, in [Pomroy's] opinion, substantiated ." (Pomroy Dep. at 143.)

According to Pomroy, he was ultimately "instructed to issue [Sloup] a summons for the violation." (Pomroy Dep. at 62.) Pomroy, however, denied that he was "just following orders" when he issued the summons. (Pomroy Dep. at 67.) Specifically, Pomroy testified: "I was instructed to issue the summons, and I agreed that it was a just issuance of that summons." (Pomroy Dep. at 67.)

b. Loeffler's Testimony

Loeffler summarized his conversations with Pomroy as follows: "I was advised that there were crab pots in Champlin's Creek. I advised him to talk to Mr. Sloup and ask him to remove them because we had a complaint that there was-they were causing a hazard to navigation." ⁵ Loeffler also stated that he independently traveled by car to Champlin's Creek, and "concurred with [Pomroy's] judgment" on the basis of Loeffler's observations there. (Loeffler Dep. at 184.)

(3) Pomroy Approaches Sloup About Alleged Hazard

According to plaintiff, on June 9, 2004, "two men" in a boat arrived at Sloup's business. (Sloup Dep. at 42.) The boat bore an insignia stating "Islip Town Harbor Police." (Sloup Dep. at 42.) The men went into the building that housed plaintiff's business, and asked plaintiff whether "the pots in Champlin's creek" were Sloup's. (Sloup Dep. at 43.) Plaintiff responded in the affirmative. (Sloup Dep. at 43.) The men then stated: "Well, we want you to remove the pots because there is a hazard to navigation." (Sloup Dep. at 43.) Sloup responded: "The pots aren't a hazard to navigation, they're off against the shore. There's hundreds of feet for people to get by. They're marked with a buoy, and I'm

legally allowed to be there by state law, and if I move those pots, I'm going to lose my business.' "(Sloup Dep. at 43.)

*5 Sloup further testified that, in response to his statement, the men stated: "'Let me call the office,' "and then proceeded back to their boat for a "short while." (Sloup Dep. at 44.) When the men returned, they informed plaintiff: "'If you don't remove the pots [from Champlin's Creek], we're going to impound them, we're going to write you a ticket and impound the pots.' "(Sloup Dep. at 45.) Sloup responded: "'Write me the ticket.' "(Sloup Dep. at 45.) The men then issued plaintiff a summons pursuant to Islip Town Code 37-56A, set forth *supra*, and a "time frame to remove the pots" of approximately 48 or 72 hours. (Sloup Dep. at 45; Defs.' Exh. R.) 8

At his deposition, Pomroy stated that, in issuing other summonses pursuant to Islip Town Code 37-56A, he could not recall another occasion on which he ordered a fisherman to remove all of his traps and buoys from a particular body of water. (Pomroy Dep. at 119-20.)

(4) Pomroy Completes Complaint Report

After issuing the summons, Pomroy proceeded back to the office and completed the Complaint Report. (Pomroy Dep. at 83.) Specifically, he completed the section entitled "Follow Up Action Taken," which states: "Issued Frank Sloup above summons for ... 37.56A Hazard to Navigation. He stated traps would be removed by 1200 hrs. on 06/10/04." (See Complaint Report.)

(5) Sloup Discusses Alleged Hazard with Loeffler

According to Sloup, after receiving the summons, he proceeded immediately to Loeffler's office at the East Islip Marina-the "harbor police office." (Sloup Dep. at 48.) Loeffler informed Sloup that plaintiff had to remove all of his pots from "all harbor areas within the Town of Islip, the killi pots, eel pots, crab pots, all fishing gear." (Sloup Dep. at 47.) In particular, Sloup testified as follows regarding his conversation with Loeffler:

We kind of had an-it was a slightly heated discussion, but I told him, I said, "Alan, I can't fish any other place at this time because of the slime in the bay. The

only place that I can fish right now is in the creeks. I'm allowed to fish there. I've never had a problem with anyone," and he said, "All your pots are a hazard." I said, "How could they be a hazard in 18 inches of water against the shore?" I said, "I can't even get to those pots in my boat except on high tide." He says, "Any water that a canoe can float in is considered navigable water in the State of New York, and a canoe could hit your killi pot in a mosquito ditch," and to get them out.

I said, "How am I going to get these pots out?" I said, "I don't have a boat that floats in that water where I have these pots." He said, "If we have to, we'll get a boat from the dock department," and I knew at that point that if anyone who didn't know how to handle this gear handled it in the wrong way, they would destroy it. So I made the decision immediately to pull the gear out, plus if it was impounded, I wouldn't have use of it for the rest of the season, so I pulled it all out so when the conditions changed, I would at least be able to make some kind of a living.

*6 (Sloup Dep. at 49-50.)

At his deposition, Loeffler admitted that he informed Sloup that he could not fish in any of the harbor areas listed in the Islip Town Code. (Loeffler Dep. at 177.) The following colloquy then ensued:

Q: What did you indicate with regards to those harbor areas in the Town of Islip?

A: That they were prohibited from causing a navigation hazard.

Q: What did that mean to you?

A: That meant that if his fishing buoys caused a navigation hazard, they would be in violation of the town code, as per the town code.

Q: Had you ever used that interpretation of the town code prior to June 9th of 2004?

A: Yes, sir.

* * *

Q: It wasn't the town code that was making the statement to Mr. Sloup; it was you?

A: Yes.

Q: In making the statement, you were in your role as the harbor master?

A: Correct.

(Loeffler Dep. at 178, 180.) Loeffler denied that Sloup specifically told him that plaintiff's business would be destroyed if he removed all of his pots. (Loeffler Dep. at 192.)

D. Loeffler's Subsequent Conversation with Richard Remmer

Attorney Richard Remmer ("Remmer") represented Sloup in 2004 in connection with his interaction with Islip, including with respect to the June 9, 2004 summons. According to Remmer, he spoke by telephone to Loeffler on June 14, 2004 regarding the summons, and Loeffler "indicated that he had determined that any fishing gear, including crab traps and eel pots, located in a Town Harbor Area would be considered a menace to navigation, regardless of the exact location of the gear or it proximity to channels, moorings or docks." (Remmer Aff. ¶ 5.) 9

Loeffler denies making this statement to Remmer. (Loeffler Dep. at 194.) Rather, Loeffler stated that he merely informed Remmer "of the definitions in the town code of the navigation law that prohibited any fishing buoy that became a hazard to navigation." (Loeffler Dep. at 141.)

E. Removal of Pots

According to Sloup, he removed the crab pots from Champlin's Creek on June 9, 2004 and, in any event, removed all of his pots from all Islip waters within 48 hours. (Sloup Dep. at 46.)

F. The Summons is Dismissed

On September 20, 2004, Sloup's summons was dismissed on the following grounds: "First, there is no factual allegation that the defendant committed the violation. Second, there is no factual allegation that the defendant failed to immediately remove the crab traps with attached

floating buoys. Finally, there is no factual allegation that the defendant is the owner of the crab traps with attached floating buoys." (Order of the District Court of the County of Suffolk, Fifth District, dated September 20, 2004.) Islip appealed, and the Appellate Division dismissed the appeal in 2005. (Remmer Aff. ¶ 4.)

G. The Events of October 6, 2004

By October 6, 2004, Sloup had put his eel pots back in the water. (Sloup Dep. at 52-53.) However, on October 6, 2004, Pomroy directed plaintiff to remove these pots. (Defs.' 56.1 ¶ 43.) Specifically, Sloup testified as follows regarding his conversation with Pomroy that day:

*7 I came in off the boat, I saw the harbor police vehicle there.... I went up to the vehicle ... I says, "Is there some kind of a problem?" He says, "You have to move your pots out of Champlin's creek." I said, "You feel those pots are a hazard to navigation?" He said, "No, they're on town property."

* * *

I said well, what-after he said they're on town property and I have to remove them, I said, "Well, what about the pots over by the marina?" He said, "They're not on town property, they're on state property."

(Sloup Dep. at 55, 56.) At oral argument, counsel for defendants denied that Pomroy stated that Sloup's eel traps were not a hazard to navigation.

In addition, Pomroy completed an Incident Report on October 6, 2004 that stated as follows: "Responded to above I/L and spoke with above subject [Sloup] in reference to 5 eel traps w/ attached markers placed in Champlin Creek. Above stated he owned and placed the traps there. Undersigned advised him to remove all traps within 24hrs and he stated he would." (Defs.' Exh. W.)

Sloup subsequently removed all of his eel pots from the water, including those by the marina that Pomroy indicated plaintiff need not remove. (Sloup Dep. at 57.) He explained: "It's very hard to go out to fish with five or six eel pots to make a living. After I lost all my other earning opportunity, it didn't make sense, so I pulled them all out." (Sloup Dep. at 57.)

At his deposition, Pomroy testified that he had no independent recollection of any interaction with Sloup on October 6, 2004. (Pomroy Dep. at 114-15.)

H. October 20, 2004 Hearing

On October 20, 2004, Remmer represented Sloup at a hearing in Suffolk County Court regarding the restrictions Islip was imposing on plaintiff's fishing. At the hearing, Islip was represented by Richard Hoffman, the Deputy Town Attorney ("Hoffman"). At the hearing, Hoffman made the following statements in describing the restrictions on Sloup's fishing:

Your Honor, if I might. The officer who issued the summons to Mr. Sloup prior had a conversation with me where he had a discussion with Mr. Sloup where he could and couldn't go. Again, informal discussions. They are in the bay saying, you got to go here, but you can't go there.

The fact is, that I've been with the Town for 18 years, this is the first time I'm aware that anyone got a summons for it. It's not a question of we are going out there an handing everybody a summons. This person was in an area he shouldn't have been, he got a summons.

* * *

The Court: Mr. Hoffman, you would have 30 seconds to tell me why I should not do what Mr. Remmer wants me to do.

Mr. Hoffman: Well, because number one, the harbor area is defined. If you say the Connetquot River, the whole Connetquot River is not a harbor area. There are certain areas on the shore that are harbor areas. That's defined by the law, state law and town laws, what a harbor is.

Now, there are proportions of every waterway within the Town of Islip that are not harbor areas, and he's free to fish, do whatever it is he's doing. I'm not sure what it is he's doing in those non-harbor areas.

*8 Again, when he was out there-after this action was posted, he did go out again. And, again, he was

told, don't do it here, do it here. Again, no summons was issued. Please move your pots. They showed him where he can go. It's not a question of the Town saying, no, we are issuing summonses for violations of law. There are definitions. Harbor area is defined. It's not as if it's a moving target, it is a definition. There are maps which show where harbor areas are.

(See Transcript of Hearing ("Tr.") at 19-20, 25-26.)

I. Other Fishermen

As set forth below, the parties dispute whether other commercial fishermen were active in the waters of Islip during the relevant time period-as well as the extent to which Section 37-56 was enforced against any such fishermen.

For instance, defendants assert that there "were no other commercial fishermen who fished the waters in the harbor areas of the Town of Islip in 2004. (Defs.' 56.1 ¶ 55.)

Plaintiff agrees that he was "unaware of others using crab pots in Champlin's Creek in June 2004, other than homeowners using pots off their docks." (Defs.' 56.1 ¶ 56.) However, Sloup also testified that commercial fishermen were generally fishing the creeks of Islip at that time. (Sloup Dep. at 261-62.) Plaintiff, in particular, noted that a commercial fisherman named John Buczek fished in the creeks of Islip during 2004. (Sloup Dep. at 262.) Indeed, Remmer stated as follows regarding an experience he had with Buczek in the fall of 2004:

I observed Town of Islip Harbor Unit members in Harbor Unit boats ... observing John Boucek fishing (trapping) in the Connetquot River in areas Alan Loeffler had indicated were areas in which fishing equipment would be seized and summonses issued if fishing occurred. They took no action against John Boucek during the ten minutes I observed Boucek's fishing activities and the Harbor Unit watching these activities.

(Remmer Aff. ¶ 6.) According to Sloup, Buczek continues to fish in the waters of Islip. (Sloup Dep. at 250.)

Further, with respect to the time period between the summons and the summons' dismissal (June 2004-September 2004), plaintiff asserts:

There were other individuals using pots and traps in the harbor areas, including homeowners and other individuals who would not be considered commercially licensed. Boucek began working in the harbor areas vacated by Sloup sometime in the fall of 2004, Jackie Verity, Tommy Quinon, John Walters fished either Babylon and Islip or areas of Islip Town harbor areas including West Islip. There were many other people, part time baymen, homeowners and single shot individuals working in the harbor areas.

(Pl.'s 56.1 Resp. ¶ 39.) 10

II. PROCEDURAL HISTORY

Sloup filed the complaint in this action on April 7, 2005. On September 26, 2005, Islip and the individual defendants separately moved to dismiss the complaint pursuant to Rules 8 and 12(f) of the Federal Rules of Civil Procedure. By Memorandum and Order dated March 13, 2006, the Court denied defendants' motions in their entirety. On May 3, 2006, Islip and the individual defendants submitted their answers to the complaint and, on May 19, 2008, Islip and the individual defendants submitted their motions for summary judgment. Plaintiff submitted his opposition on June 16, 2008. Defendants submitted their replies on June 30, 2008. The Court held oral argument on July 11, 2008.

A. The Remmer Affidavit and the Hearing Transcript

*9 At oral argument, defendants objected on procedural grounds to the Court's considering two pieces of evidence proffered by plaintiff: the Remmer Affidavit and the transcript of the October 20, 2004 hearing in Suffolk County Court, described *supra*. In particular, defendants objected to the Remmer Affidavit on the grounds that

it contains hearsay evidence, and to the transcript on the grounds that Sloup had not produced it to defendants until oral argument. Although the Court rejected defendants' objections on the record during oral argument-stating that the Court would fully consider all of the evidence submitted by the parties, including the Remmer Affidavit (to the extent it contained certain portions that were based on personal knowledge) and the transcript-the Court also afforded defendants the opportunity to make additional written submissions regarding these two documents. Defendants made such submissions on August 8, 2008. Plaintiff responded to these submissions on August 14, 2008. 11 The Court has carefully reviewed the parties' additional submissions and, as set forth below, continues to conclude that the Court may properly consider both the portions of the Remmer Affidavit based on personal knowledge and the transcript for purposes of deciding the instant motion.

As stated supra, defendants object to the Remmer Affidavit on hearsay grounds. However, for purposes of the summary judgment motions, the Court has relied solely on those portions of the Remmer Affidavit that relay Remmer's personal observations and direct conversations. Thus, defendants' hearsay objection is moot. With respect to the transcript, defendants argue that the statements of the Deputy Town Attorney are inadmissible hearsay. However, these statements, at a minimum, are admissible against Islip pursuant to Rule 801(d)(2) of the Federal Rules of Civil Procedure as admissions by an Islip employee. Further, although Islip argues that the statements in the transcript are unsworn, there is no requirement under this Rule that an admission be a sworn statement and the issues regarding the facts and circumstances of the statements go to their weight, not their admissibility. 12 Moreover, the Court has not considered this statement in isolation against Islip, but rather has simply considered the transcript in the context of the overall factual record in this case. ¹³

III. STANDARD OF REVIEW

The standards for summary judgment are well settled. Pursuant to Federal Rule of Civil Procedure 56(c), a court may not grant a motion for summary judgment unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show

that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); Bronx Household of Faith v. Bd. of Educ. of City of N. Y., 492 F.3d 89, 96 (2d Cir.2007). The moving party bears the burden of showing that he or she is entitled to summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986); Huminski v. Corsones, 396 F.3d 53, 69 (2d Cir.2005). The court "is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." Amnesty America v. Town of West Hartford, 361 F.3d 113, 122 (2d Cir.2004); see Anderson, 477 U.S. at 248 (summary judgment is unwarranted if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."); Rivkin v. Century 21 Teran Realty LLC, 494 F.3d 99, 103 (2d Cir.2007). As such, "if 'there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] favor may be drawn, the moving party simply cannot obtain a summary judgment." "Binder & Binder PC v. Barnhart, 481 F.3d 141, 148 (2d Cir.2007) (quoting R.B. Ventures, Ltd. v. Shane, 112 F.3d 54, 59 (2d Cir.1997)) (alteration in original).

IV. DISCUSSION

*10 As stated *supra*, Sloup brought his claims pursuant to Section 1983. Section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." Baker v. McCollan, 443 U.S. 137, 145 n. 3 (1979). 14 For claims under Section 1983, a plaintiff must prove that "(1) the challenged conduct was attributable at least in part to a person who was acting under color of state law and (2) the conduct deprived the plaintiff of a right guaranteed under the Constitution of the United States." Snider v. Dylag, 188 F.3d 51, 53 (2d Cir.1999) (citation omitted). Here, the parties do not dispute that defendants were acting under color of state law. The question presented, therefore, is whether defendants' conduct deprived Sloup of the rights he asserts under the First and Fourteenth Amendments. As set forth below the Court denies defendants summary judgment with respect to the Fourteenth Amendment claims, but grants summary judgment with respect to the First Amendment claims.

A. Fourteenth Amendment Claims

Plaintiff claims that defendants violated his substantive due process and equal protection rights pursuant to the Fourteenth Amendment. ¹⁵ For the reasons set forth below, defendants' motions for summary judgment are denied with respect to both claims.

(1) Substantive Due Process

As the Second Circuit has explained, "[t]he touchstone of due process is protection of the individual against arbitrary action of government." In particular, the Fourteenth Amendment affords "[s]ubstantive dueprocess rights ... against the government's exercise of power without any reasonable justification in the service of a legitimate governmental objective." Tenenbaum v. Williams, 193 F.3d 581, 600 (2d Cir.1999), cert. denied, 2000 U.S. LEXIS 3033 (May 1, 2000). According to Sloup, his substantive due process rights were violated when defendants allegedly caused plaintiff-without legal authority and on the sole basis of personal animosity-to remove all of his fishing equipment from the waters of Islip and, thereby, destroyed plaintiff's commercial fishing business. As set forth below, the Court has determined that, if plaintiff's version of events is credited, a rational jury could find that Sloup's right to substantive due process was thus violated. The Court, therefore, denies defendants summary judgment with respect to Sloup's substantive due process claim.

a. Legal Standard

In order to demonstrate a violation of substantive due process rights under the Fourteenth Amendment, a plaintiff must demonstrate that (1) he had a "valid property interest"; and (2) "defendants infringed on that property right in an arbitrary or irrational manner." *Cine SK8 v. Town of Henrietta*, 507 F.3d 778, 784 (2d Cir.2007) (citing *Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 503 (2d Cir.2001)). The Court describes each of these elements below.

1. Property Interest

*11 To meet the first prong of the test for substantive due process violations, a plaintiff must show that he has a "valid property interest." *Cine SK8 v. Town of Henrietta*, 507 F.3d 778, 784 (2d Cir.2007) (citing *Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 503 (2d Cir.2001)). In particular,

Circuit [t]he Second uses strict entitlement test to determine whether a party's interest in land-use regulation is protectible under the Fourteenth Amendment.... Because the U.S. Constitution generally does not create property interests, this court, in applying the entitlement test, looks to existing rules or understandings that stem from an independent source such as state law to determine whether a claimed property right rises to the level of a right entitled to protection under the substantive due process doctrine....

507 F.3d at 784-85 (citations and quotation marks omitted); see also Clubside, Inc. v. Valentin, 468 F.3d 144, 152 (2d Cir.2006) ("This Circuit applies a 'clear entitlement' analysis to determine whether a landowner has a constitutionally cognizable property interest in the benefit sought. This approach derives from the analysis set forth in [Board of Regents v. Roth, 408 U.S. 564 (1972))]. In Roth, the Supreme Court held that, [t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.") (citation and quotation marks omitted).

Further, the Second Circuit has specifically set forth the standard for determining whether a plaintiff possesses such a valid property interest under New York State law:

> Under New York law, a property owner has no right to an existing land-use benefit unless that right has vested. In New York, a vested right can be acquired when, pursuant to a legally-issued permit, the landowner

demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further the development. In order to gain the vested right, [t]he landowner's actions relying on a valid permit must be so substantial that the municipal action results in serious loss rendering the improvements essentially valueless.

507 F.3d at 784-85 (citations and quotation marks omitted); see also Frooks v. Town of Cortlandt, 997 F.Supp. 438, 450-51 (S.D.N.Y.1998) (explaining in context of substantive due process analysis that, "[u]nder New York law, a vested right ... may arise where a landowner demonstrates a commitment to the purpose for which the [certificate] was granted by effecting substantial changes and incurring substantial expense to further the development. However, neither the issuance of the certificate, nor the landowner's substantial changes and expenditures, standing alone, will establish a vested right. The landowner's reliance on the certificate must have been so substantial that the municipal action results in serious loss rendering the improvements essentially valueless.") (citations and quotation marks omitted).

2. Arbitrary or Irrational Infringement on Property Interest

*12 In order to meet the second prong of a substantive due process claim, plaintiffs must show "that defendants infringed their property right in an arbitrary or irrational manner." Cine SK8, 507 F.3d at 785. In particular, plaintiffs must show that the government's infringement was "'arbitrary,' 'conscience shocking,' or 'oppressive in the constitutional sense,' not merely 'incorrect or illadvised.' " Ferran v. Town of Nassau, 471 F.3d 363, 369-70 (2d Cir.2006); see also Harlen Assocs. v. Inc. Vill. of Mineola, 273 F.3d 494, 505 (2d Cir.2001) ("As we have held numerous times, substantive due process 'does not forbid governmental actions that might fairly be deemed arbitrary or capricious and for that reason correctable in a state court lawsuit.... [Its] standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority.") (quoting Natale v. Town of Ridgefield, 170 F.3d 258, 263 (2d Cir.1999)); Crowley v. Courville, 76 F.3d 47, 52 (2d Cir.1996) (explaining that plaintiff meets second prong of substantive due process test "only when government acts with no legitimate reason for its decision") (citation and quotation marks omitted); Pina v. Lantz, 495 F.Supp.2d 290, 297 (D.Conn.2007) (" 'Mere irrationality is not enough: only the most egregious official conduct, conduct that shocks the conscience, will subject the government to liability for a substantive due process violation based on executive action.' ") (quoting O'Connor v. Pierson, 426 F.3d 187, 203 (2d Cir.2005)) (internal quotation marks omitted).

For example, "[i]n the zoning context, a government decision regulating a landowner's use of his property offends substantive due process if the government action is arbitrary or irrational. Government regulation of a landowner's use of his property is deemed arbitrary or irrational, and thus violates his right to substantive due process, only when government acts with no legitimate reason for its decision." Southview Assoc., Ltd. v. Bongartz, 980 F.2d 84, 102 (2d Cir.1992) (citations and quotation marks omitted); see also Merry Charters, LLC v. Town of Stonington, 342 F.Supp.2d 69, 78 (D.Conn.2004) (explaining that "denial by a local zoning authority violates substantive due process standards only if the denial is so outrageously arbitrary as to constitute a gross abuse of governmental authority") (citation and quotation marks omitted). For instance, in the context of a substantive due process claim against the Town of Colchester where zoning rights were at issue, the Second Circuit reversed a grant of summary judgment to the Town where, inter alia, it "had no authority under state law" to take certain actions with respect to plaintiffs' "protected property interest in the use of their property." Brady v. Town of Colchester, 863 F.2d 205, 215-16 (2d Cir.1988). The Second Circuit explained that under these circumstances, a "trier of fact could conclude that there was no rational basis for the [Town's zoning board's] actions, and that, as a result, the [zoning board] violated appellants' rights to substantive due process." Id. at 216 (citation and quotation marks omitted).

b. Application

*13 Here, with respect to the first prong of the substantive due process test-namely, whether Sloup possessed a constitutionally-cognizable property interest-

the Court has carefully reviewed the record and concludes that genuine issues of material fact exist as to whether Sloup possessed such an interest in his fishing permits and commercial fishing business. As a threshold matter, it is undisputed that: (1) Sloup incorporated Crabs Unlimited, a commercial fishing business, in 1999; (2) Sloup possesses a special license for crabbing; and (3) as of June 9, 2004, Sloup had placed eight or nine crab pots marked with buoys on the East side of Champlin's Creek in Islip, and thirty to thirty-three crab pots marked with buoys on two double rows on the West side of Champlin's Creek, as well as other fishing equipment throughout the harbors of Islip. In addition to these undisputed facts, and as described supra, Sloup has either testified or provided other evidence that (1) he has been a commercial fisherman since 1953; (2) he has been fishing commercially for a variety of fish since 2002; (3) he possesses a general commercial fishing permit from New York State; (4) in an average season, he uses 50 killi pots, 800 crab pots, 500 conch pots, 400 eel pots, and 120 blow fish pots; (5) as of June 9, 2004, at least half of plaintiff's eel pots were in the waters of Islip; (6) Sloup had placed pots in several portions of Islip, including Nichols creek, Champlin's creek, at the very mouth of Orowoc creek, Awixa creek, and the Bay Shore cove; and (7) defendants' actions caused him to remove all of his fishing equipment from Islip and, thus, vitiated his ability to "make a living." Under these circumstances, if plaintiff's version of events is credited, a rational jury could conclude that Sloup expended substantial effort and expense in reliance on his fishing permits-and, therefore, on his ability to maintain a commercial fishing business in Islip-and that defendants' actions caused such substantial loss to Sloup that his efforts became valueless. Thus, the Court declines to conclude as a matter of law that plaintiff cannot meet the first prong of the test for substantive due process violations.

The Court has also determined, as set forth below, that material issues of fact preclude the Court from determining as a matter of law that defendants did not infringe on Sloup's property right in an arbitrary or irrational, conscience-shocking manner.

As a threshold matter, it is undisputed that defendants lack the legal authority to regulate fishing in the waters of Islip and are authorized only to regulate "hazards to navigation"-defined specifically in the Town Code as a "vessel or floating or submerged object which becomes

a menace to navigation." Nevertheless, in support of his substantive due process claim, and as described supra, Sloup has proffered the following evidence: (1) Loeffler's alleged statement in the 1990s that "If it's the last thing I do, I'm going to get you and your buoys out of this bay"; (2) the testimony of Pomroy-who personally identified Sloup's eel pots as a "menace to navigation" under the Town Code, and signed the summons-that he understood a "hazard to navigation" to be "something in the way that would be-something that would prevent running a-a course-you know, running my course through the waterway to get from where I was to where I wanted to get without having some sort of problem with whatever it was that was in the waterway in front of me"; (2) Pomroy's testimony that, in issuing other summonses pursuant to Islip Town Code 37-56A, he could not recall another occasion-other than June 9, 2004-on which he ordered a fisherman to remove all of his traps and buoys from a particular body of water; (3) Sloup's testimony that Loeffler informed Sloup that plaintiff had to remove all of his pots from "all harbor areas within the Town of Islip, the killi pots, eel pots, crab pots, all fishing gear" and that "[a]ll" of plaintiff's pots posed a hazard because "[a]ny water that a canoe can float in is considered navigable water in the State of New York, and a canoe could hit [Sloup's] killi pot in a mosquito ditch"; (4) Remmer's sworn statement that Loeffler "indicated [to Remmer] that he had determined that any fishing gear, including crab traps and eel pots, located in a Town Harbor Area would be considered a menace to navigation, regardless of the exact location of the gear or it proximity to channels, moorings or docks"; (5) Remmer's sworn statement that he "has observed the tidal waters of the south shore of the Town of Islip over the last five decades" and, "[p]rior to June 9, 2004, there was never, in [his] experience, any attempt by the Town of Islip" to impose a "blanket exclusion" such as the exclusion imposed on Sloup; (6) the dismissal of the June 9, 2004 summons on the grounds, in part, that "there is no factual allegation that the defendant committed the violation"; (7) Sloup's testimony that Pomroy informed him in October 2004 that plaintiff had to remove all of his pots from Champlin's creek even though the pots did not pose a hazard to navigation, on the grounds that the pots were on Islip property; (8) Loeffler's testimony that he informed Sloup that he could not fish in any of the harbor areas listed in the Islip Town Code; (9) Hoffman's statement at the hearing in October that Sloup was issued a summons because he was fishing in "harbor areas"; (10) Hoffman's statement at the hearing in October that Sloup was the only fisherman to receive a similar summons; (11) Sloup's testimony that commercial fishermen were generally fishing the creeks of Islip during the relevant time period, and Remmer's sworn statement that he observed such a fisherman, i.e., Buscek, "fishing (trapping) in the Connetquot River in areas Alan Loeffler had indicated were areas in which fishing equipment would be seized and summonses issued if fishing occurred" and that the Harbor Unit saw Buscek and "took no action against John Boucek during the ten minutes [Remmer] observed Boucek's fishing activities"; and (12) Remmer's and Sloup's testimony that Buscek continues to fish in the waters of Islip. In addition, as stated *supra*, the parties completely dispute whether Sloup's pots actually posed a "menace to navigation" under the Town Code on June 9, 2004. Indeed, as the parties made evident at oral argument, this crucial factual dispute is reflected not only in the parties' testimony regarding their vastly differing observations on June 9, 2004, described above, but also in the parties' differing interpretations of historical and photographic evidence.

*14 Under these circumstances, the Court has determined that genuine issues of material fact-including key questions revolving around photographic and historical evidence-preclude the Court from determining that Sloup's substantive due process claim fails as a matter of law. Specifically, if Sloup's version of events is credited, a rational jury could find that-on the basis of personal animosity toward Sloup-defendants knowingly and intentionally subjected plaintiff (and only plaintiff) to a legally unfounded, blanket geographical prohibition from fishing in all of the harbor areas of Islip, despite defendants' knowledge that defendants were not legally authorized to regulate fishing and that plaintiff's pots did not pose a hazard to navigation under the Town Code. ¹⁶ The Court, therefore, denies defendants summary judgment on plaintiff's substantive due process claim. See Cine SK8, 507 F.3d at 789 ("In its resolution amending plaintiff's special use permit, the reasons the Town Board offered for its actions included (a) that Fun Quest had failed to fulfill the written and verbal commitments it had made to the Town Board with respect to security arrangements and with respect to admissions policies for teen dances and (b) that Fun Quest did not cooperate with the Town Board's request that it suspend teen dances pending the hearing on the special use permit. Under the Code, these rationales might have justified the Board's revocation or suspension of Fun Quest's special use permit. They do not, however, justify the actions that the Town Board took; specifically, the Code does not permit the Town Board to amend a special use permit for these reasons or for any other. And, as defendants' counsel conceded at oral argument, if the Town Board did not have authority for the actions it took regarding Fun Quest's permit-as it appears it did not-the Board's actions were ultra vires and, as a result, sufficiently arbitrary to amount to a substantive due process violation."). ¹⁷

(2) Equal Protection Claims

The Equal Protection Clause of the Fourteenth Amendment requires the government to treat all similarly situated individuals alike. *City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 439 (1985). Here, Sloup brings claims pursuant to the Equal Protection Clause under two different theories: "selective enforcement" and "class of one." As the Court sets forth below, because a rational jury could find in favor of plaintiff under both theories, the Court denies defendants summary judgment on plaintiff's equal protection claims. ¹⁸

a. "Class of One" 19

1. Legal Standard

In *Prestopnik v. Whelan*, the Second Circuit explained the difference between "class of one" equal protection claims and more traditional equal protection claims:

"The Equal Protection Clause requires that the government treat all similarly situated people alike." Harlen Assocs. v. Inc. Vill. of Mineola, 273 F.3d 494, 499 (2d Cir.2001). While this clause "is most commonly used to bring claims alleging discrimination based on membership in a protected class," it may also be used to bring a "class of one" equal protection claim. Neilson v. D'Angelis, 409 F.3d 100, 104 (2d Cir.2005); see also Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). In a "class of one" case, the plaintiff uses "the existence of persons in similar circumstances who received more favorable treatment than the plaintiff ... to provide an inference that the plaintiff was intentionally singled out for reasons that so lack any reasonable nexus with a legitimate governmental policy that an

improper purpose-whether personal or otherwise-is all but certain." *Neilson*, 409 F.3d at 105.

*15 No. 06-3186-cv, 2007 U.S.App. LEXIS 19612, at *3-*4 (2d Cir. Aug. 16, 2007); see also King v. N.Y. State Division of Parole, No. 05-1860-pr, 2008 U.S.App. LEXIS 875, at *11 (2d Cir. Jan. 16, 2008) ("In [Olech], the Supreme Court recognized the viability of an Equal Protection claim 'where the plaintiff alleges that [he] has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.") (quoting Olech, 528 U.S. at 564). In particular, as the Court sets forth below, in order to prevail on a class of one claim, a plaintiff must demonstrate that (1) he was treated differently from a similarly situated individual; (2) the differential treatment was arbitrary and irrational; and (3) the treatment was not based on a discretionary or subjective decision.

(A) Similarly Situated

First, in order to prevail on a class of one claim,

the plaintiff "must demonstrate that [[h]e was] treated differently than someone who is prima facie identical in all relevant respects." *Neilson*, 409 F.3d at 104 (quoting *Purze v. Vill. of Winthrop Harbor*, 286 F.3d 452, 455 (7th Cir.2002)). This requires a showing that the level of similarity between the plaintiff and the person(s) with whom she compares herself is "extremely high"-so high (1) that "no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy," and (2) that "the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendant acted on the basis of a mistake." *Neilson*, 409 F.3d at 104-05.

Prestopnik, 2007 U.S.App. LEXIS 19612, at *4-*5; see also Doninger v. Niehoff, 527 F.3d 41, 53 (2d Cir.2008) ("[A] class-of-one plaintiff must show ... an 'extremely high degree of similarity between [himself] and the persons to whom [he] compare[s] [himself]' in order to succeed on an equal protection claim.") (quoting Clubside, Inc. v. Valentin, 468 F.3d 144, 159 (2d Cir.2006); King, 2008 U.S.App. LEXIS 875 at *11 (explaining that, subsequent to Olech, the Second Circuit has "held that 'the level of similarity between [class of

one] plaintiffs and the persons with whom they compare themselves must be extremely high' ") (quoting Neilson v. D'Angelis, 409 F.3d 100, 104 (2d Cir.2005)); Clubside, Inc., 468 F.3d at 159 ("We have held that class-ofone plaintiffs must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves. This showing is more stringent than that used at the summary judgment stage in the employment discrimination context.") (citation omitted); Pina v. Lantz, 495 F.Supp.2d 290, 304 (D.Conn.2007) ("[T]he Second Circuit has left no doubt that a [class of one] plaintiff must meet a high threshold to move beyond summary judgment. Specifically, for a plaintiff to demonstrate that he or she was treated differently from similarly situated individuals in an irrational manner, in violation of the Fourteenth Amendment, the plaintiff must demonstrate that he or she is prima facie identical to the comparators.") (citation and quotation marks omitted). Further, "[g]enerally, whether two [individuals] are similarly situated is a factual issue that should be submitted to the jury." Cine SK8, 507 F.3d at 790-91 (noting that "rule is not absolute and a court can properly grant summary judgment where it is clear that no reasonable jury could find the similarly situated prong met") (citations and quotation marks omitted); Clubside, Inc., 468 F.3d at 159 (explaining that, "[glenerally, whether parties are similarly situated is a fact-intensive inquiry," although "a court may grant summary judgment in a defendant's favor on the basis of lack of similarity of situation, however, where no reasonable jury could find that the persons to whom the plaintiff compares itself are similarly situated").

(B) Irrational and Arbitrary Basis

*16 In addition, the plaintiff must demonstrate "that the defendant intentionally treated [him] differently, with no rational basis." *Prestopnik*, 2007 U.S.App. LEXIS 19612, at *5; *see also Price v. City of New York*, No. 06-3481-cv, 2008 U.S.App. LEXIS 3133, at *2 (2d Cir. Feb. 13, 2008) ("To prevail on a 'class of one' selective treatment claim without asserting membership in a protected class, Price must demonstrate, *inter alia*, that the defendants *intentionally* treated him differently from others similarly situated without any rational basis.") (emphasis in original); *Siao-Pao v. Connolly*, No. 06 Civ. 10172, 2008 U.S. Dist. LEXIS 48697, at *27 (S.D.N.Y. June 25, 2008) ("This Court has interpreted the Olech

standard to require that differential treatment be both intentional and irrational to satisfy the class of one standard."); *Assoko v. City of New York*, 539 F.Supp.2d 728, 735 n.7 (S.D.N.Y.2008) (explaining that, in contrast with selective enforcement claims, which require "showing of animus or 'malicious or bad faith intent,' " class of one claims are based on " 'irrational and wholly arbitrary' governmental conduct"). ²⁰

(C) Lack of Discretion or Subjectivity

In addition to the two elements set forth above, the Supreme Court recently set forth another requirement for plaintiffs bringing class of one claims. Specifically, in *Engquist v. Oregon Department of Agriculture*, the Supreme Court held that such plaintiffs must show that the differential treatment received resulted from non-discretionary state action:

There are some forms of state action ... which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments. In such cases the rule that people should be 'treated alike, under like circumstances and conditions' is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.

128 S.Ct. 2146, 2154 (June 9, 2008); see also Siao-Pao, 2008 U.S. Dist. LEXIS at *27 ("Additionally, the Supreme Court recently clarified the Olech holding by limiting class of one claims in contexts characterized by individualized and subjective determinations").

2. Application

Here, with respect to the similarly situated element of a class of one claim, after carefully reviewing the record in the light most favorable to Sloup, and drawing all reasonable inferences in his favor, the Court finds that genuine issues of material fact preclude the Court from determining as a matter of law that Sloup's comparator fishermen were not similarly situated to plaintiff. Specifically, if Sloup's evidence is credited that (1) a commercial fisherman named John Buczek fished in the creeks of Islip during 2004; and (2) according to Remmer, he observed Buczek "fishing (trapping) in the Connetquot River in areas Alan Loeffler had indicated were areas in which fishing equipment would be seized and summonses issued if fishing occurred," a rational jury could find that Buczek was "someone who is prima facie identical in all relevant respects" to Sloup. See, e.g., Viruet v. Connecticut, No. 3:03CV1345, 2006 U.S. Dist. LEXIS 17536, at *12 (D.Conn. Mar. 29, 2006) (denying summary judgment on class of one claim in part because plaintiff presented evidence that a single other individual was similarly situated to-and treated differently fromplaintiff).

*17 Similarly, there are disputed issues of material fact that preclude summary judgment on whether defendants knowingly and intentionally treated Sloup differently from Buczek without a rational basis. In particular, if the evidence described supra with respect to plaintiff's substantive due process claim is credited-including, inter alia, (1) Loeffler's alleged statement in the 1990s that "If it's the last thing I do, I'm going to get you and your buoys out of this bay"; (2) Pomroy's testimony that, in issuing other summonses pursuant to Islip Town Code 37-56A, he could not recall another occasion-other than June 9, 2004-on which he ordered a fisherman to remove all of his traps and buoys from a particular body of water; (3) Sloup's testimony that Loeffler informed Sloup that plaintiff had to remove all of his pots from "all harbor areas within the Town of Islip, the killi pots, eel pots, crab pots, all fishing gear" and that "[a]ll" of plaintiff's pots posed a hazard because "[a]ny water that a canoe can float in is considered navigable water in the State of New York, and a canoe could hit [Sloup's] killi pot in a mosquito ditch"; (4) Remmer's sworn statement that Loeffler "indicated [to Remmer] that he had determined that any fishing gear, including crab traps and eel pots, located in a Town Harbor Area would be considered a menace to navigation, regardless of the exact location of the gear or it proximity to channels, moorings or docks"; (5) Remmer's sworn statement that he "has observed the tidal waters of the south shore of the Town of Islip over the last five decades" and, "[p]rior to June 9, 2004, there was never, in [his] experience, any attempt by the Town of Islip" to impose a "blanket exclusion" such as the exclusion imposed on Sloup; (6) the dismissal of the June 9, 2004 summons on the grounds, in part, that "there is

no factual allegation that the defendant committed the violation"; (7) Sloup's testimony that Pomroy informed him in October 2004 that plaintiff had to remove all of his pots from Champlin's creek even though the pots did not pose a hazard to navigation, on the grounds that the pots were on Islip property; (8) Loeffler's testimony that he informed Sloup that he could not fish in any of the harbor areas listed in the Islip Town Code; (9) Hoffman's statement at the hearing in October that Sloup was issued a summons because he was fishing in "harbor areas"; (10) Hoffman's statement at the hearing in October that Sloup was the only fisherman to receive a similar summons; (11) Remmer's statement that he observed Buscek fishing in the areas prohibited to Sloup; and (12) Sloup' statement that Buscek continues to fish the waters of Islip-a rational jury could conclude that plaintiff was intentionally and irrationally treated in a different manner from an individual, i.e., Buscek, in a prima facie identical position.

Finally, the Court has determined that genuine issues of material fact preclude the Court from determining as a matter of law that defendants' actions resulted from discretionary or subjective decision-making under the rule in Endquist. As a threshold matter, the Court notes that Sloup's claims relate, in part, to the question of whether his fishing equipment posed a "menace to navigation" under the Town Code. If this were the only factual or legal issue in the case, the Court recognizes that the Endquist rule would preclude a class of one claim because such a determination is clearly discretionary. However, despite the fact that certain of defendants' decisions may have had such a discretionary component, fundamental to Sloup's case is the premise that defendants lacked any authority whatsoever to regulate fishing and that defendants, nevertheless, maliciously imposed a blanket restriction on all of plaintiff's fishing activities in Islip. Because it is beyond cavil that such actions, taken in the absence of any legal authority, are not "discretionary," the Court declines to conclude as a matter of law that the Endquist rule bars a class of one claim under the circumstances of this case.

*18 In sum, after carefully reviewing the record in the light most favorable to Sloup, and drawing all reasonable inferences in his favor, the Court has determined that the record contains genuine issues of material fact regarding each of the components of a class of one claim and, therefore, the Court denies defendants summary judgment

as to this claim. See Nat'l Council of Arab Americans v. City of New York, 478 F.Supp.2d 480, 496 (S.D.N.Y.2007) (denying summary judgment on class of one claim, despite defendants' argument that plaintiffs failed "to establish differential treatment," on the grounds that "a trial is necessary to determine, inter alia, whether Plaintiffs were similarly situated to other permit applicants and whether those applicants were treated differently than Plaintiffs"); Viruet v. Connecticut, No. 3:03CV 1345, 2006 U.S. Dist. LEXIS 17536, at *12 (D.Conn. Mar. 29, 2006) ("Viruet has presented sufficient evidence to bring his [class of one] claim before a jury.... With no rational basis for the disparate treatment of two virtually identical individuals, Viruet could prove to a jury that there was no rational basis for Armstrong's decision."); Piscottano v. Town of Somers, 396 F.Supp.2d 187, 205 (D.Conn.2005) ("Because Piscottano has created a genuine issue of material fact as to whether she has been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment, summary judgment is ... denied on [her class of one] claim.") (citation and quotation marks omitted).

b. Selective Enforcement

1. Legal Standard

The Second Circuit has "described selective enforcement as a 'murky corner of equal protection law in which there are surprisingly few cases.' " *Diesel v. Town of Lewisboro*, 232 F.3d 92, 103 (2d Cir.2000) (quoting *LeClair v. Saunders*, 627 F.2d 606, 608 (2d Cir.1980)). As set forth below, however, and as the Second Circuit held in *Cine SK8*, it is well settled that plaintiffs must meet a two-pronged test in order to successfully demonstrate selective enforcement under the Fourteenth Amendment. *Cine SK8*, 507 F.3d at 790.

(A) Similarly Situated ²¹

First, plaintiff must demonstrate that he "was treated differently from other similarly situated [individuals]." *Id.* (citations and quotation marks omitted); *see also Church of the American Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 210 (2d Cir.2004) ("A selective enforcement claim requires, as a threshold matter,

a showing that the plaintiff was treated differently compared to others similarly situated."). In particular, at the summary judgment stage, a "plaintiff must present evidence comparing [himself] to individuals that are 'similarly situated in all material respects.' "Sebold v. City of Middletown, No. 3:05-CV-1205, 2007 U.S. Dist. LEXIS 70081, at *81 (D.Conn. Sept. 21, 2007) (quoting Graham v. Long Island R. R., 230 F.3d 34, 39 (2d Cir.2000)).

*19 Further, the Second Circuit has held that, to the extent a municipality is selectively enforcing land use restrictions, a plaintiff would be "hard pressed" to demonstrate selective treatment without also demonstrating the municipality's knowledge of the other, unenforced violations. See LaTrieste Rest. v. Village of Port Chester, 188 F.3d 65, 69 (2d Cir.1999), cert. denied 2000 U.S. LEXIS 1580 (Feb. 28, 2000); see, e.g., Zavatsky v. Anderson, No. 3:00cv844, 2004 U.S. Dist. LEXIS 7440, at *23 (D.Conn. Mar. 8, 2004) (denying summary judgment where material issues of fact remained as to defendant's knowledge of similarly situated individuals treated differently from plaintiff). However, the Second Circuit also stated:

We do not hold that knowledge will be required in every case. It is conceivable that selective treatment could be shown where, for example, proof was offered that a municipality did not know of prior violations because it adhered to a see-no-evil policy of not enforcing an ordinance, and then abandoned that policy with respect to a violator engaged in protected activity.

LaTrieste, 188 F.3d at 70 n.1.

Further, as with class of one claims, and "[a] s a general rule, whether items are similarly situated is a factual issue that should be submitted to the jury." *Harlen Assocs. v. Inc. Vill. of Mineola,* 273 F.3d 494, 499 n.2 (2d Cir.2001) (explaining that "rule is not absolute, however, and a court can properly grant summary judgment where it is clear that no reasonable jury could find the similarly situated prong met"); *see, e.g., Kirschner v. Zoning Bd. of Appeals,* 924 F.Supp. 385, 394 (E.D.N.Y.1996) ("The issues presented ... regarding whether the two auto body shops are similarly situated present classic issues of fact. Under these facts and circumstances, whether the

locations of different entities are sufficiently analogous when making an equal protection claim is not the sort of decision this Court should make as a matter of law. The two auto body operations were both located in the village of Valley Stream. According to the plaintiffs, they sought similar permits during a similar period. The Court believes that whether, based on these allegations, the two shops can be considered similarly situated is a question best left to the trier of fact.").

(B) Impermissible Considerations

With respect to the second prong, the Second Circuit has held that a plaintiff must demonstrate that the "differential treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." Cine SK8, 507 F.3d at 790 (citations and quotation marks omitted); see also Freedom Holdings Inc. v. Int'l Tobacco Partners, Ltd., 357 F.3d 205, 234 (2d Cir.2004) ("To establish a violation of the Equal Protection Clause based on selective enforcement, a plaintiff must ordinarily show the following: '(1) [that] the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.") (quoting Lisa's Party City, Inc. v.. Town of Henrietta, 185 F.3d 12, 16 (2d Cir.1999)). In particular, the Second Circuit has explained that, in analyzing the second prong of selective enforcement claims, courts must distinguish between a "motivation to punish [in order] to secure compliance with agency objectives," and "spite, or malice, or a desire to "'get' [someone] for reasons wholly unrelated to any legitimate state objective." Bizzarro v. Miranda, 394 F.3d 82, 82 (2d Cir.2005) (quoting Esmail v. Macrane, 53 F.3d 176, 180 (7th Cir.1995)).

*20 Moreover, as with the similarly situated prong, the Second Circuit has emphasized that "the issue of whether an action was motivated by malice generally is a question of fact properly left to the jury...." *Harlen Assocs. v. Inc. Vill. of Mineola,* 273 F .3d 494, 502 (2d Cir.2001) (explaining that courts may, however, grant summary judgment based on issue of malice where nonmoving party "adduces nothing more than

speculation to support its claims"); see also Fair Haven Development Corp. v. DeStefano, 528 F.Supp.2d 25, 32 (D.Conn.2007) ("Although [second prong of selective enforcement claim] generally present[s] a question of fact properly left to the jury, it is appropriate to grant summary judgment where the non-moving party adduces nothing more than speculation to support its claims.") (citations and quotation marks omitted).

2. Application

Here, Sloup's selective enforcement claim survives summary judgment for substantially the same reasons that plaintiff's class of one claim survives, as described supra. Namely, with respect to the similarly situated element of the selective enforcement claim, after carefully reviewing the record in the light most favorable to Sloup, and drawing all reasonable inferences in his favor, the Court finds that genuine issues of material fact preclude the Court from determining as a matter of law that Sloup's comparator fisherman was not similarly situated to plaintiff. Specifically, if Sloup's evidence is credited that (1) a commercial fisherman named John Buczek fished in the creeks of Islip during 2004; and (2) according to Remmer, he observed Buczek "fishing (trapping) in the Connetquot River in areas Alan Loeffler had indicated were areas in which fishing equipment would be seized and summonses issued if fishing occurred," a rational jury could find that Buczek was similarly situated to Sloup in all material respects.

Similarly, the Court declines to conclude as a matter of law that defendants did not knowingly and intentionally treat Sloup differently from Buczek in a malicious manner, for the purpose of causing plaintiff injury. In particular, if the evidence described supra with respect to plaintiff's substantive due process claim is credited-including, inter alia, (1) Loeffler's alleged statement in the 1990s that "If it's the last thing I do, I'm going to get you and your buoys out of this bay"; (2) Pomroy's testimony that, in issuing other summonses pursuant to Islip Town Code 37-56A, he could not recall another occasion-other than June 9, 2004-on which he ordered a fisherman to remove all of his traps and buoys from a particular body of water; (3) Sloup's testimony that Loeffler informed Sloup that plaintiff had to remove all of his pots from "all harbor areas within the Town of Islip, the killi pots, eel pots, crab pots, all fishing gear" and that "[a]ll" of plaintiff's pots posed a hazard because "[a]ny water that a canoe can float in is considered navigable water in the State of New York, and a canoe could hit [Sloup's] killi pot in a mosquito ditch"; (4) Remmer's sworn statement that Loeffler "indicated [to Remmer] that he had determined that any fishing gear, including crab traps and eel pots, located in a Town Harbor Area would be considered a menace to navigation, regardless of the exact location of the gear or it proximity to channels, moorings or docks"; (5) Remmer's sworn statement that he "has observed the tidal waters of the south shore of the Town of Islip over the last five decades" and, "[p]rior to June 9, 2004, there was never, in [his] experience, any attempt by the Town of Islip" to impose a "blanket exclusion" such as the exclusion imposed on Sloup; (6) the dismissal of the June 9, 2004 summons on the grounds, in part, that "there is no factual allegation that the defendant committed the violation"; (7) Sloup's testimony that Pomroy informed him in October 2004 that plaintiff had to remove all of his pots from Champlin's creek even though the pots did not pose a hazard to navigation, on the grounds that the pots were on Islip property; (8) Loeffler's testimony that he informed Sloup that he could not fish in any of the harbor areas listed in the Islip Town Code; (9) Hoffman's statement at the hearing in October that Sloup was issued a summons because he was fishing in "harbor areas"; (10) Hoffman's statement at the hearing in October that Sloup was the only fisherman to receive a similar summons; (11) Remmer's statement that he observed Buscek fishing in the areas prohibited to Sloup; and (12) Sloup' statement that Buscek continues to fish the waters of Islip-a rational jury could conclude that plaintiff was intentionally and maliciously treated in a different manner from an individual, i.e., Buscek, that was similarly situated to plaintiff in all material respects.

*21 Under these circumstances, the Court denies defendants motions for summary judgment on plaintiff's selective enforcement claim. See Brady, 863 F.2d at 261-17 (acknowledging that, in response to appellants' selective enforcement claim, appellees "insist that all of these statements and events are susceptible of different interpretations, and that together they do not constitute sufficient evidence to prove appellants' claims," but holding that "[n]evertheless, on a summary judgment motion all ambiguities and inferences to be drawn from the underlying facts should be resolved in the light most favorable to the nonmoving party. Applying this standard to the facts presented, we believe that the

evidence adduced by appellants of discriminatory intent and selective and improper enforcement is sufficient to withstand a motion for summary judgment. We find this to be particularly so in light of the record evidence which suggests that appellants' property might have been zoned for commercial use all along, in which case appellees' actions may have been wholly unwarranted under the law. Thus, appellees have failed to meet their burden of establishing that there is no genuine issue of material fact to be submitted to the trier of fact with respect to appellants' equal protection claim"); Terminate Control Corp. v. Horowitz, 28 F.3d 1335, 1353 (2d Cir.1994) ("The record in this case amply establishes genuine issues of material fact as to whether the individual defendants named in Nu-Life's fourth amended complaint singled out Nu-Life for selective, injurious treatment (1) in retaliation for its exercise of First Amendment rights, or (2) with a malicious or bad faith intent to injure Nu-Life.... We are aware, of course, that the individual defendants contend that Nu-Life's problems resulted from poor performance of its contractual obligations, rather than invidiously selective action by those defendants. This factual controversy should be resolved by the trier of fact, not on a motion for summary judgment.").

B. First Amendment Claim

Sloup alleges that defendants violated his First Amendment rights in three different ways: (1) by issuing him the June 9, 2004 summons in retaliation for litigating Sloup v. Islip in 1974, as discussed supra; (2) by issuing him the June 9, 2004 summons in retaliation for refusing to voluntarily remove his crab pots from the water, as Pomroy had suggested that day; and (3) by ordering him to remove all of his pots from the water on October 6, 2004 in retaliation for litigating the June 9, 2004 summons. ²² However, as set forth below, after carefully reviewing the record in the light most favorable to Sloup and drawing all reasonable inferences in his favor, the Court has determined that no genuine issues of material fact warrant a trial on plaintiff's First Amendment claims-on any of the three factual grounds he has proffered-because the record contains absolutely no evidence that defendants actually chilled the exercise of plaintiff's First Amendment rights. Thus, the Court grants summary judgment to defendants on plaintiff's First Amendment claim.

(1) Legal Standard

*22 "Official reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right,' and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." Hartman v. Moore, 126 S.Ct. 1695, 1701 (2006) (quoting Crawford-El v. Britton, 523 U.S. 574, 588 n.10 (1998)) (additional citation omitted). In particular, the Second Circuit has "described the elements of a First Amendment retaliation claim in several ways, depending on the factual context." Williams v. Town of Greenburgh, No. 06-4897-cv, 2008 U.S.App. LEXIS 15403, at *10 (2d Cir. July 22, 2008). Where, as in the instant case, a "private citizen ... sue[s] a public official," id. at 11, such plaintiff must demonstrate that "'(1) [he] has an interest protected by the First Amendment; (2) defendants' actions were motivated or substantially caused by his exercise of that right; and (3) defendants' actions effectively chilled the exercise of his First Amendment right." " Id. (quoting Curley v. Village of Suffern, 268 F.3d 65, 73 (2d Cir.2001)); see also Morrison v. Johnson, 429 F.3d 48, 51 (2d Cir.2005) (explaining that, in contrast to public employee asserting First Amendment retaliation claim against employer, private citizens suing public officials must demonstrate chilling).

Specifically, in order to meet the chilling requirement, a plaintiff must "come forward with evidence showing either that (1) defendants silenced him or (2) "defendant[s'] actions had some actual, non-speculative chilling effect' on his speech." *Williams*, 2008 U.S.App. LEXIS 15403, at *16 (quoting *Columbo v. O'Connell*, 310 F.3d 115, 117 (2d Cir.2002)). Thus, "[w]here a party can show no change in his behavior, he has quite plainly shown no chilling of his First Amendment right to free speech." *Curley*, 268 F.3d at 73. In particular, "[t]he Supreme Court has held that 'allegations of a subjective "chill" ' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Id.* (quoting *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972)).

(2) Application

Here, in opposing defendants' motions to dismiss his First Amendment claim, Sloup simply asserts, in a wholly conclusory fashion, that defendants intended to chill plaintiff's speech. (Pl.'s Opp. at 13.) However, even assuming arguendo that defendants actually had this intention-an assumption for which the Court has found no basis in the record ²³-Sloup does not refer to any evidence that his speech was actually chilled. Indeed, the Court has carefully reviewed the record in the light most favorable to Sloup and, even drawing all inferences in his favor, has found absolutely no evidence that plaintiff was silenced or that his First Amendment rights were chilled whatsoever by defendants' alleged conduct. On the contrary, the record reflects-as described above-that Sloup successfully fought the June 9, 2004 summons, and that Sloup's attorney represented plaintiff during a court hearing regarding his fishing rights after the incident in October 2004. Thus, the record demonstrates that plaintiff vigorously exercised his First Amendment rights subsequent to all of the allegedly retaliatory conduct plaintiff has alleged. Under these circumstances, the Court has determined that Sloup's First Amendment claim fails as a matter of law and, therefore, summary judgment for defendants on this claim is warranted. See Williams, 2008 U.S.App. LEXIS 15403, at *16-*17 ("It is abundantly clear from the record that Williams's readiness to hold forth on his perceived mistreatment at the hands of Bland and White was unimpaired by their allegedly punitive conduct. Because Williams cannot show that his speech was either silenced or chilled-i.e., that his right to free speech was actually violated-Williams's claim fails as a matter of law."); Smolicz v. Borough/Town of Naugatuck, No. 06-6539-cv, 2008 U.S.App. LEXIS 12503, at *6-*7 (2d Cir. June 12, 2008) ("Even if the search was motivated by Defendants'/Appellees' desire to 'deter or silence' Smolicz's criticism of the police department and its leadership in his newsletters, Smolicz has not shown that their attempt to do so was successful. The district court determined that Smolicz had not shown a chilling of his rights because he continued to publish his newsletter and attend union meetings after the search was executed. On this appeal, Smolicz does not challenge that determination in any meaningful way, other than to state conclusorily that his First Amendment right to free speech was violated further by the chilling effect the defendants' actions had on his ability to publish his union newsletter, Police Biz. Such a conclusory statement[]... is not sufficient to defeat a summary judgment motion." (citation and quotation marks omitted); Curley, 268 F.3d at 73 (affirming district

court's grant of summary judgment to defendants on First Amendment retaliation claim where plaintiff could not demonstrate chilling).

C. Municipal Liability

*23 In addition, Islip argues that it is entitled to summary judgment on the grounds that Sloup has failed to demonstrate municipal liability as a matter of law. However, as set forth below, because the Court finds that genuine issues of material fact exist as to Islip's municipal liability, the Court rejects Islip's argument and denies Islip's motion for summary judgment on this ground without prejudice to Islip's renewing it prior to the jury's receipt of the case.

(1) Legal Standard

a. Evidence of Municipal Custom or Policy

The Supreme Court expressly rejected liability pursuant to a theory of respondeat superior for purposes of Section 1983 in Monell. See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978) ("[A] municipality cannot be held liable solely because it employs a tortfeasor-or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory."). Thus, "[a] municipality will not be held liable under § 1983 unless plaintiffs can demonstrate that the allegedly unconstitutional action of an individual law enforcement official was taken pursuant to a policy or custom officially adopted and promulgated by that [municipality's] officers." Abreu v. City of New York, No. 04-CV-1721, 2006 U.S. Dist. LEXIS 6505, at *11 (E.D.N.Y. Feb. 22, 2006) (quotation marks omitted) (citing Monell, 436 U.S. at 690). However, " 'the mere assertion ... that a municipality has such a custom or policy is insufficient in the absence of allegations of fact tending to support, at least circumstantially, such an inference." " Zahra v. Town of Southold, 48 F.3d 674, 685 (2d Cir.1995) (quoting Dwares v. City of New York, 985 F.2d 94, 100 (2d Cir.1993)). The plaintiff in a Section 1983 action bears the burden of establishing municipal liability. See Vippolis v. Vill. of Haverstraw, 768 F.2d 40, 44 (2d Cir.1985), cert. denied, 480 U.S. 916, 107 S.Ct. 1369, 94 L.Ed.2d 685 (1987).

b. Policymakers

In addition to demonstrating directly that a municipality has a custom or policy that led to a constitutional violation, the Second Circuit has held that a plaintiff may demonstrate municipal liability by showing that a municipal "policymaker" violated plaintiff's constitutional rights:

Where plaintiffs allege that their rights were deprived not result of the enforcement of an unconstitutional official policy or ordinance, but by the unconstitutional application of a valid policy, or by a [municipal] employee's single tortious decision or course of action, the inquiry focuses on whether the actions of the employee in question may be said to represent the conscious choices of the municipality itself. Such an action constitutes the act of the municipality and therefore provides a basis for municipal liability where it is taken by, or is attributable to, one of the [municipality's] authorized policymakers.

Amnesty Am. v. Town of West Hartford, 361 F.3d 113, 126 (2d Cir.2004); see also Gronowski v. Spencer, 424 F.3d 285, 296 (2d Cir.2005) ("Municipal liability may attach under § 1983 when a [municipal] policymaker takes action that violates an individual's constitutional rights."); Davis v. Lynbrook Police Dept., 224 F.Supp.2d 463, 478 (E.D.N.Y.2002) ("A plaintiff can show a municipal custom, policy or practice by establishing that an official who is a final policymaker directly committed or commanded the constitutional violation..."). Indeed, "[e]ven one episode of illegal retaliation may establish municipal liability under § 1983 if ordered by a person whose edicts or acts represent official city policy." Gronowski, 424 F.3d at 296; see also Amnesty Am., 361 F.3d at 126 ("Thus, even a single action by a decisionmaker who 'possesses final authority to establish municipal policy with respect to the action ordered' is sufficient to implicate the municipality in the constitutional deprivation for the purposes of § 1983.") (citation omitted) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481-82 (1986)). "Whether the official in question possessed final policymaking authority is a legal question, which is to be answered on the basis of state law.... The relevant legal materials[] include state and local positive law, as well as custom or usage having the force of law." *Jeffes v. Keenan*, 208 F.3d 49, 57 (2d Cir.2000), *cert. denied*, 2000 U.S. LEXIS 4908 (Oct. 2, 2000). Specifically, " '[t]he matter of whether the official is a final policymaker under state law is to be resolved by the trial judge before the case is submitted to the jury.' " *Richardson v. Metropolitan Dist. Commission*, No. 3-00-CV-1062, 2003 U.S. Dist. LEXIS 12757, at *20 (D.Conn. July 23, 2003) (quoting *Jeffes*, 208 F.3d at 57).

*24 In particular, where a municipal official "'has final authority over significant matters involving the exercise of discretion,' his choices represent government policy." Gronowski, 424 F.3d at 297 (quoting Rookard v. Health and Hosps. Corp, 710 F.2d 41, 45 (2d Cir.1983)); see also Diodati v. City of Little Falls, No. 6:04-CV-446, 2007 U.S. Dist. LEXIS 4322, at *6 (N.D.N.Y. Jan. 18, 2007) ("A policymaker is an individual whose 'decisions, at the time they are made, for practical or legal reasons constitute the municipality's final decisions.' ") (quoting Anthony v. City of New York, 339 F.3d 129, 139 (2d Cir.2003) (internal citation and quotation marks omitted). Moreover, "the official in question need not be a municipal policymaker for all purposes. Rather, with respect to the conduct challenged, he must be responsible under state law for making policy in that area of the [municipality's] business." Jeffes, 208 F.3d at 57 (citation and quotation marks omitted) (emphasis in original). "Thus, the court must ask whether [the] governmental official [is a] final policymaker[] for the local government in a particular area, or on [the] particular issue involved in the action." Jeffes, 208 F.3d at 57 (citations and quotation marks omitted); see also Doe v. City of Waterbury, 453 F.Supp.2d 537, 543 (D.Conn.2006) ("The critical inquiry is not whether an official generally has final policymaking authority; rather, the court must specifically determine whether the government official is a final policymaker with respect to the particular conduct challenged in the lawsuit.") (emphasis in original). However, "[a]lthough the official in question does not have to be a final policymaker for all purposes, but only with respect to the conduct challenged, simply exercising discretion in an area where that official is not the final policymaker under state law cannot, by itself, establish municipal liability." Barry v. N.Y. City Police Dept., No. 01 Civ.

10627, 2004 U.S. Dist. LEXIS 5951, at *43 (S.D.N.Y. Apr. 7, 2004; see also Diodati, 2007 U.S. Dist. LEXIS 4322, at *6 ("An individual who merely has discretion to handle a particular situation is not a policymaker."); Richardson, 2003 U.S. Dist. LEXIS 12757, at *20 ("Mere discretion in the performance of his duties is not sufficient. However, the official need only have the power to make official policy on a particular issue."). On the other hand, where a policymaker "exceeded the bounds of the authority granted to him," his actions "cannot be fairly said to represent official policy." Doe v. City of Waterbury, 453 F.Supp.2d 537, 544 (D.Conn.2006) ("[A]lthough Giordano is generally a final policymaker for Waterbury, Giordano's specific actions in this case cannot be fairly said to represent official policy, because under state law, he exceeded the bounds of the authority granted to him.")

c. The Actions of Subordinates

Further, the Second Circuit has also recognized that,

*25 More often than not ... plaintiffs allege constitutional deprivations at the hands of the lower-level municipal employees to whom some authority has been delegated, rather than at the hands of those officials with final policymaking authority. While allowing the municipality to be held liable on the basis of the mere delegation of authority by a policymaking official would result in *respondeat superior* liability, allowing delegation, without more, to defeat municipal liability would contravene the remedial purposes of § 1983. Therefore, § 1983 plaintiffs may establish that the city is liable for their injuries by proving that the authorized policymakers approve[d] a subordinate's decision and the basis for it.

Thus, when a subordinate municipal official is alleged to have committed the constitutional violation, municipal liability turns on the plaintiff's ability to attribute the subordinate's conduct to the action or omissions of higher ranking officials with policymaking authority. One means of doing so, of course, is to establish that a policymaker ordered or ratified the subordinates' actions.

Amnesty Am., 361 F.3d at 126; see also Bruker v. City of New York, 337 F.Supp.2d 539, 556 (S.D.N.Y.2004) ("In addition to establishing that a policymaker ordered a subordinate's decision, a plaintiff can show municipal

liability by demonstrating that 'the policymaker was aware of a subordinate's unconstitutional actions, and consciously chose to ignore them, effectively ratifying the actions.' ") (quoting Amnesty Am., 361 F.3d at 126); Barry, 2004 U.S. Dist. LEXIS 5951, at *43-*44 ("Moreover, if policymaker liability is premised on the fact that the official knew of and approved of the act in question (as opposed to ordering the act or executing it herself), the plaintiff must also prove that the official knew that the subordinate employees took that action for unconstitutional reasons."); Houghton v. Cardone, 295 F.Supp.2d 268, 277 (W.D.N.Y.2003) ("Even in the absence of an explicitly adopted rule or regulation, a plaintiff may prove the existence of municipal policy if he can show that the unlawful act was done or approved by the person with final policymaking authority in the area in which the action was taken. Where, however, liability is premised on the policymaker's approval of a subordinate's unlawful act, it must be shown that the policymaker ratified both the subordinate's decision and the basis for it") (citations and quotation marks omitted).

(2) Application

Here, as set forth below, the Court has determined that genuine issues of material fact preclude the Court from determining as a matter of law at this juncture that Islip is not municipally liable under the circumstances of this case and, therefore, the Court denies Islip's motion without prejudice to its renewal at the close of evidence in this case.

As a threshold matter, the Court has determined-after carefully reviewing the record in the light most favorable to Sloup, and drawing all reasonable inferences in his favor-that the record contains genuine issues of material fact as to whether Islip had a custom or policy of imposing a blanket geographic prohibition on commercial fishing in the waters of Islip, or as-applied to Sloup. Specifically, in light of Hoffman's role as Islip's attorney-and in the overall factual context of this case-a rational jury could find that Hoffman's statement at the hearing in October that Sloup was issued a summons because he was fishing in "harbor areas" directly demonstrates that Islip had a policy to issues summonses under such legally unauthorized circumstances.

*26 Moreover-as an independent basis for denying summary judgment to Islip on municipal liability grounds-

the Court has determined that the record contains insufficient evidence for the Court to determine as a matter of law-at this juncture-whether Loeffler was a municipal "policymaker" in the area of navigational hazards vis a vis commercial fishermen. In particular, as stated supra, the parties dispute the most basic and critical issue regarding Loeffler, i.e., his actual professional title and responsibilities, including whether he is the "Harbor Master" described in the Town Code, or whether he holds what is presumably an even higher position, i.e., "Chief Harbor Master," or whether he is the "Chief of Harbor Police" or "Chief of Marine Law Enforcement Harbor Police." ²⁴ Although the individual defendants contend in a conclusory manner that Loeffler was not a policymaker, they fail to point to any evidence demonstrating that any official other than Loeffler was empowered to determine the standard by which Islip determined whether commercial fishing equipment posed a hazard to navigation under the Town Code. On the contrary, the record contains evidence tending to suggest that Loeffler was, indeed, such a policymaker-namely (1) Sloup's testimony that Loeffler informed Sloup that plaintiff had to remove all of his pots from "all harbor areas within the Town of Islip, the killi pots, eel pots, crab pots, all fishing gear" and that "[a]ll" of plaintiff's pots posed a hazard because "[a]ny water that a canoe can float in is considered navigable water in the State of New York, and a canoe could hit [Sloup's] killi pot in a mosquito ditch"; (2) Remmer's sworn statement that Loeffler "indicated [to Remmer] that he had determined that any fishing gear, including crab traps and eel pots, located in a Town Harbor Area would be considered a menace to navigation, regardless of the exact location of the gear or it proximity to channels, moorings or docks"; (3) Remmer's sworn statement that he "has observed the tidal waters of the south shore of the Town of Islip over the last five decades" and, "[p]rior to June 9, 2004, there was never, in [his] experience, any attempt by the Town of Islip" to impose a "blanket exclusion" such as the exclusion imposed on Sloup; (4) Loeffler's testimony that he informed Sloup that he could not fish in any of the harbor areas listed in the Islip Town Code; and (5) the colloquy during Loeffler's deposition where he agreed that it was he, and not the Town Code, that made such statements to Sloup. Nevertheless, because neither party has provided sufficient information regarding Loeffler's precise responsibilities, both generally and with respect to the specific conduct at issue in this case, it would be inappropriate for the Court to determine as a matter of law that Loeffler did not-at the very least, on the day Sloup received his summons-possess complete policymaking authority over such issues. ²⁵

*27 With respect to Pomroy, the individual defendants simply argue that Pomroy was merely following Loeffler's orders and, therefore, that Pomroy's actions cannot give rise to municipal liability. ²⁶ However, as described above, even assuming arguendo that Pomroy was just following orders-or that his conduct was ratified by Loeffler-Pomroy's actions may give rise to municipal liability to the extent that Loeffler was a policymaker. Indeed, after carefully reviewing the record in the light most favorable to Sloup, and drawing all reasonable inferences in his favor, the Court has determined that-as a third, independent ground for municipal liability in this casegenuine issues of material fact exist as to whether Pomroy was following Loeffler's orders and/or whether Pomroy's actions were ratified by Loeffler-namely, (1) Pomroy testimony that "I was instructed to issue the summons, and I agreed that it was a just issuance of that summons"; (2) Loeffler's testimony that "I was advised that there were crab pots in Champlin's Creek. I advised [Pomroy] to talk to Mr. Sloup and ask him to remove them because we had a complaint that there was-they were causing a hazard to navigation" and that Loeffler independently traveled by car to Champlin's Creek, and "concurred with [Pomroy's] judgment" on the basis of Loeffler's observations there; and (3) Sloup's testimony that, on the day he received the summons, Pomroy called his office prior to issuing the summons. Under these circumstances, a rational jury could find that Loeffler either ordered or ratified Pomroy's actions and, in light of the Court's inability to determine at this juncture whether Loeffler was a policymaker, the Court declines to conclude as a matter of law that Pomroy's conduct cannot give rise to municipal liability.

In sum, the Court denies Islip's motion for summary judgment on municipal liability grounds without prejudice to Islip's renewing it at the close of the evidence at trial. See Barry, 2004 U.S. Dist. LEXIS 5951, at *46-*48 ("Thus, the parties ask the court to decide the question of the individual defendants' policymaking authority in a vacuum.... While it seems likely ... that the Police Commissioner bore final policymaking authority in the areas implicated by the adverse acts taken against plaintiff, and that he would have to have ordered or ratified the adverse acts in question, or at least known that Mullane, Reiss, and Fox had a retaliatory motive

for carrying them out, the court needs more information about the power and authority of the police officers in question beyond the information provided by the parties before it can make a final determination as a matter of law. The Court is mindful, however, that plaintiff Barry bears the ultimate burden of establishing New York City's liability based on the acts of its policymakers.") (citations omitted); Iannillo v. County of Orange, 187 F.Supp.2d 170, 187 (S.D.N.Y.2002) ("Although we find it likely that, at minimum, Kirchner had final policymaking authority, this Court does not have sufficient evidence to make such a determination as a matter of law. Neither party has submitted any evidence illuminating the extent to which the County delegated to defendants authority to make personnel decisions for the Department. More information is needed before a final determination can be made on this issue. Accordingly, defendants' motion for summary judgment on plaintiff's municipal liability claim must be denied without prejudice. We note, however, that the burden of demonstrating that defendants were the final municipal policymakers will ultimately rest with plaintiff.") (citations omitted).

D. Qualified Immunity

*28 The individual defendants also contend that they are entitled to summary judgment on qualified immunity grounds for all of the constitutional violations Sloup claims. ²⁷ For the reasons set forth below, however, the Court denies summary judgment to the individual defendants on this ground.

(1) Legal Standard

According to the Second Circuit, government actors may be shielded from liability for civil damages if their "conduct did not violate plaintiff's clearly established rights, or if it would have been objectively reasonable for the official to believe that his conduct did not violate plaintiff's rights." *Mandell v. County of Suffolk*, 316 F.3d 368, 385 (2d Cir.2003); *see also Fielding*, 2007 U.S.App. LEXIS 28939, at *4 (explaining that government officers "are protected by qualified immunity if their actions do not violate clearly established law, or it was objectively reasonable for them to believe that their actions did not violate the law"). "A right is clearly established when the contours of the right [are] sufficiently clear that a

reasonable official would understand that what he is doing violates that right.... The unlawfulness must be apparent." Connell v. Signoracci, 153 F.3d 74, 80 (2d Cir.1998) (citations and quotation marks omitted). In addition, the Second Circuit has repeatedly stated that qualified immunity only protects officials performing "discretionary functions." See Simons v. Fitzgerald, No. 07-0773-cv, 2008 U.S.App. LEXIS 15782, at *2 (2d Cir. July 25, 2008) (" 'Qualified immunity shields government officials performing discretionary functions from liability for civil damages....' ") (quoting Zellner v. Summerlin, 494 F.3d 344, 367 (2d Cir.2007)); Piscottano v. Town of Somers, 396 F.Supp.2d 187, 208 (D.Conn.2005) (" 'The qualified immunity doctrine protects government officials from civil liability in the performance of discretionary functions as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.' ") (quoting Lee v. Sandberg, 136 F.3d 94, 100 (2d Cir.1997)).

As the Second Circuit has also noted, "[t]his doctrine is said to be justified in part by the risk that the 'fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." "McClellan v. Smith, 439 F.3d 137, 147 (2d Cir.2006) (quoting Thomas v. Roach, 165 F.3d 137, 142 (2d Cir.1999) (quotation marks omitted)). Thus, qualified immunity is not merely a defense, but is "an entitlement not to stand trial or face the other burdens of litigation." Forsyth, 472 U.S. at 526. Accordingly, courts should determine the availability of qualified immunity "at the earliest possible stage in litigation." Hunter v. Bryant, 502 U.S. 224, 227 (1991).

With respect to the summary judgment stage in particular, the Second Circuit has held that courts should cloak defendants with qualified immunity at this juncture "only if the court finds that the asserted rights were not clearly established, or if the evidence is such that, even when it is viewed in the light most favorable to the plaintiff[] and with all permissible inferences drawn in [his] favor, no rational jury could fail to conclude that it was objectively reasonable for the defendants to believe that they were acting in a fashion that did not violate a clearly established right." Ford v. McGinnis, 352 F.3d 582, 597 (2d Cir.2003) (quoting Williams v. Greifinger, 97 F.3d 699, 703 (2d Cir.1996)); see also Oliveira v. Mayer, 23 F.3d 642, 649 (2d Cir.1994) ("Though [qualified] immunity ordinarily should be decided by the court, that is true only in

those cases where the facts concerning the availability of the defense are undisputed; otherwise, jury consideration is normally required.") (citations and quotation marks omitted); Stancuna v. Sherman, No. 3:07CV00491, 2008 U.S. Dist. LEXIS 49059, at *18 (D. Conn. June 27, 2008) ("Here, the court finds that summary judgment on qualified immunity grounds is inappropriate. As the Second Circuit has held, [w]hen a motion for summary judgment is made in the context of a qualified immunity defense, the question of whether the factual disputes are material is even more critical. As noted above, there are issues of material fact in this case that this court may not decide. These issues of fact are critical to determining whether Sherman was operating under a reasonable belief as to what kind of search he was permitted to conduct.") (citation and quotation marks omitted).

(2) Application

*29 Here, it is not in dispute that the rights Sloup asserts-namely, his right to conduct his commercial fishing business, using legal permits, without arbitrary and wholly unauthorized state action depriving him of the use of his fishing equipment and livelihood-are clearly established. See, e.g., Cobb v. Pozzi, 363 F.3d 89, 111 (2d Cir.2003) (explaining that "law pertaining to 'class of one' equal protection claims was clearly established in 1999" and, indeed, may date back generally to 1923); Brady, 863 F.2d at 217 ("It is well settled that enforcement of an otherwise valid zoning ordinance violates the Constitution ... if ... the decision of the particular zoning body is arbitrary, ... or if the ordinance is applied or enforced with a discriminatory intent or purpose. We conclude that the appellees are not entitled to claim the defense of qualified immunity in the event that they are found to have violated the appellants' fourteenth amendment rights.") (citations and quotation marks omitted). Moreover, as described above, the Court has found that genuine issues of material fact preclude the Court from determining as a matter of law that these clearly established rights were not violated. Thus, the critical question is whether it was objectively reasonable for the individual defendants to believe that they were not committing such violations and, as the Court sets forth below, the Court declines to so conclude as a matter of law that it was objectively reasonable for defendants to believe that they were not violating plaintiff's rights.

Specifically, according to the Second Circuit, the very fact that the Court has determined-as described *supra* with respect to Sloup's substantive due process and class of one claims-that a rational jury could find that the individual defendants singled Sloup out in an irrational and arbitrary manner is independently sufficient to preclude the Court from determining as matter of law that the individual defendants' actions were objectively reasonable. As the Second Circuit observed in *Cobb v. Pozzi*,

The defendants also argue that they are entitled to qualified immunity as a matter of law because they treated the plaintiffs in an "objectively reasonable" manner. Under the circumstances, however, this is a question for the jury. We have already determined that there was enough evidence for the jury, rather than the district court, to decide whether the defendants treated the plaintiffs differently from similarly situated officers and had a rational basis for doing so. The issue of rational treatment is not sufficiently different from the issue of whether the defendants acted in an "objectively reasonable" manner so as to lead us to resolve the latter issue as a matter of law where we have concluded in the face of disputed issues of fact that the jury must resolve the former issue. See Pathways Psychosocial v. Town of Leonardtown, 133 F.Supp.2d 772, 793 (D.Md.2001) (concluding that the defendants were not entitled to qualified immunity on the grounds that they acted in an objectively reasonable manner where a jury could find that their actions were irrational). Cf. Stefanoff v. Hays County, Texas, 154 F.3d 523, 526 (5th Cir.1998) (finding that a policy was not objectively reasonable after determining that the policy was not rational for equal protection purposes); cf. also Tesfu v. Ashcroft, 322 F.3d 477, 481 (7th Cir.2003) (noting that, in the context of asylum determinations, a fear of persecution must be "objectively reasonable" and therefore may not be "irrational"); Perinpanathan v. I.N.S., 310 F.3d 594, 597-98 (8th Cir.2002) (same). Indeed, it is difficult for us to see how conduct that is irrational (if so found by a jury) could nevertheless be objectively reasonable. Given these circumstances, the facts pertaining to whether the defendants acted in an objectively reasonable fashion, like those pertaining to the issue of whether they treated the plaintiffs differently from similarly situated officers for rational reasons, must be evaluated by a jury rather than by a court as a matter of law.

*30 363 F.3d at 111-12. 28 Here, for the reasons stated *supra*, the Court has determined that-if Sloup's version of events is credited-a rational jury could find that defendants intentionally, irrationally, and arbitrarily subjected plaintiff (and only plaintiff) to a legally unfounded, blanket geographical prohibition from fishing in all of the harbor areas of Islip, despite defendants' conceded knowledge that they were not legally authorized to regulate fishing and that plaintiff's pots did not pose a hazard to navigation under the Town Code. Under these circumstances, the Court declines to conclude as a matter of law that the individual defendants' conduct was objectively reasonable. See Walz v. Town of Smithtown, 46 F.3d 162, 169 (2d Cir.1995) ("Regardless of any doubts as to whether his conduct violated due process, Dowling could not have believed, as a matter of equal protection or simply of the laws of the town, that he had discretion to deny an excavation permit to the Walzes as a means of extorting land from them. Indeed, appellants offer no authority whatsoever that might have led Dowling to believe otherwise."); Viruet, 2006 U.S. Dist. LEXIS 17536, at *12-13 ("Further, Armstrong is not entitled to qualified immunity at this juncture because "the issue of rational treatment is not sufficiently different from the issue of whether [Armstrong] acted in an objectively reasonable manner so as to lead [the court] to resolve the latter issue as a matter of law where [the court] has concluded in the face of disputed issues of fact that the jury must resolve the former issue.") (quoting Cobb, 363 F.3d at 112) (internal quotation marks omitted); see generally TLC Development, Inc. v. Town of Branford, 855 F.Supp. 555, 558-59 (D.Conn.1994) ("A finding of arbitrariness not only establishes a due process violation but precludes a defense of qualified immunity.... Further [the zoning commission defendant's] regulations specifically limited consideration of the sections on which it relied for the purpose of ordering modifications, not outright denials of site plan applications. It follows that there was no discernible, lawful authority for denial of plaintiff's site plan application. In doing so, it violated plaintiff's substantive due process rights. Accordingly the Town and the members of the commission are not entitled to summary judgment as a matter of law and their motion is denied.") (citations and quotation marks omitted). Accordingly, the Court denies the individual defendants' summary judgment motion on qualified immunity grounds. ²⁹

V. CONCLUSION

For the foregoing reasons, the Court denies defendants' motions for summary judgment with respect to Sloup's Fourteenth Amendment claims, and grants their motions with respect to plaintiff's First Amendment claims. With respect to plaintiff's municipal liability claim, Islip's motion for summary judgment is denied without prejudice to Islip's renewing it at the close of evidence at trial. ³⁰

*31 SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2008 WL 3978208

Footnotes

- In addition, plaintiff originally brought a claim pursuant to the Fourth Amendment. However, he agreed to withdraw that claim at oral argument.
- In addition, as a threshold matter, with regard to Sloup's claims against the individual defendants in their official capacities, the Court has determined that these claims are duplicative of the municipal liability claim lodged against Islip under *Monell*

- v. Department of Social Services, 436 U.S. 658 (1978), discussed *infra*. See, e.g., Tsotesi v. Bd. of Educ., 258 F.Supp.2d 336, 338 n.10 (S.D.N.Y.2003) (dismissing claims against officials sued in their official capacities where plaintiff also sued municipality) (citing *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985)). Therefore, the Court dismisses all claims against the individual defendants sued in their official capacities. As also stated above, however, Sloup's Fourteenth Amendment claims against the individual defendants in their individual capacities survive summary judgment.
- 3 In their reply brief, the individual defendants argue that Sloup has failed to comply with Local Civil Rule 56.1 in that he did not properly respond to Defendants' Joint 56.1 Statement ("Defs.' 56.1"). The Court agrees that Sloup failed to provide specific record citations for virtually all of the objections he lodged against Defs.' 56.1, as well as for the factual propositions set forth in his own 56.1 statement ("Pl.'s 56.1"). However, "[a] district court has broad discretion to determine whether to overlook a party's failure to comply with local court rules." Holtz v. Rockefeller & Co., 258 F.3d 62, 73 (2d Cir.2001) (citations omitted); see also Gilani v. GNOC Corp., No. 04-CV-2935 (ILG), 2006 WL 1120602, at *2 (E.D.N.Y. Apr. 26, 2006) (exercising court's discretion to overlook the parties' failure to submit statements pursuant to Local Civil Rule 56.1). Here, plaintiff's written submissions-including, inter alia, plaintiff's response to Defs. '56.1 ("Pl.'s 56.1 Resp.") and Pl.'s 56.1-cite generally to the portions of the record upon which plaintiff is relying. Thus, both the moving parties and the Court are aware of the portions of the record upon which plaintiff relies in opposition to the motion, and defendants have not identified any prejudice arising from plaintiff's failure to comply with Rule 56.1. Accordingly, in the exercise of its broad discretion, the Court will not reject plaintiff's opposition based upon his failure to comply with Rule 56.1, but rather has fully considered plaintiff's opposition to defendants' summary judgment motions on the merits. See, e.g., Photopaint Techs., LLC v. Smartlens Corp., 335 F.3d 152, 156 n. 2 (2d Cir.2003) (excusing failure to comply with Local Civil Rule 56.1 where the relevant facts were apparent from the parties' submissions and there was no evidence of prejudice from the defect); Williams v. R.H. Donnelley Inc., 199 F.Supp.2d 172, 174 n.1 (S.D.N.Y.2002) (excusing failure to submit statement pursuant to Local Civil Rule 56.1 where the facts were set forth in the party's memorandum of law).
- 4 Although Sloup does not appear to dispute that Islip is authorized to regulate navigational hazards, *i.e.*, hazards to boating, counsel for plaintiff repeatedly emphasized at oral argument that this authority does not extend to the regulation of fishing.
- At Loeffler's deposition, Sloup's counsel asked him whether, "[a]s of June 9th 2004, ... pots in general in Champlin's Creek [were] a navigation hazard." (Loeffler Dep. at 148.) Loeffler responded: "Depending on where the pots were set." (Loeffler Dep. at 148.) Later in the deposition, Loeffler stated that he was not personally aware of the position of any of Sloup's pots in Champlin's Creek on June 9, 2004 because "[t]hat wasn't my case. It was Officer Pomroy's case." (Loeffler Dep. at 150.) However, Loeffler testified that, in his twenty years of experience with Champlin's Creek prior to June 9, 2004, he had observed "pots, traps or buoys for pots or traps" in Champlin's Creek every time he was there. (Loeffler Dep. at 176.)
- Although Sloup did not identify the "two men" by name in describing the events of June 9, 2004 at his deposition, it is undisputed that Pomroy and a coworker-Officer Sgroi-were the two individuals in question. (Pomroy Dep. at 67-68.)
- At his deposition, Pomroy did not dispute that Sloup said that he would lose his business. (Pomroy Dep.at 62.) However, Pomroy also testified: "It didn't-it wasn't a consideration either way. It wasn't-I didn't really put any thought into it. Wasn't-wasn't my job to decide whether or not he was going to lose his business." (Pomroy Dep. at 62.) Loeffler denied knowing that Sloup would lose his business or that plaintiff had told Pomroy that plaintiff would lose his business. (Loeffler Dep. at 146.)
- This was the first summons Sloup ever received from Islip related to fishing. (Defs. '56.1 ¶ 70.)
- Remmer also pointed out that he "has observed the tidal waters of the south shore of the Town of Islip over the last five decades" and, "[p]rior to June 9, 2004, there was never, in [his] experience, any attempt by the Town of Islip to impose the policy of blanket exclusion of fishing equipment in the creeks and rivers propounded to [Remmer]" by Loeffler. (Remmer Aff. ¶ 29.)
- The Court, however, has reviewed the record citations plaintiff provides in support of this assertion and finds that they fail to support plaintiff's broad claim. For instance, plaintiff cites the Remmer Affidavit, but that document refers only to Buzcek. Further, plaintiff cites to Sloup's deposition, but plaintiff testified that Quinon, Walters, and Verity were fishing in Babylon, not Islip. (Sloup Dep. at 345.) In other words, plaintiff has failed to cite to any evidence in the record-including his own deposition and affidavit-suggesting that any commercial fishermen were fishing the waters of Islip during 2004 other than Buzcek and Sloup.
- 11 Counsel for defendants also filed letters seeking to have the Court disregard and/or strike the letter dated August 14, 2008 from plaintiff's counsel because it contained "defamatory comments and disparaging statements against the attorneys who are/were employed by the Town of Islip and outside counsel attorneys." (Letter from Office of the Town Attorney, dated August 15, 2008, at 1.) Although the Court is denying the motion because such relief is unwarranted under these circumstances and has fully considered the legal and factual arguments contained in the letter of plaintiff's counsel, the

Court cautions plaintiff's counsel that his submissions and statements to the Court should be focused on the legal and factual arguments relating to the relevant issues, rather than engaging in personal attacks on opposing counsel in making those arguments. Moreover, the Court notes that, based upon its review of the motions papers, the court docket, and its interaction with counsel for defendants at court proceedings, the Court sees absolutely no evidence of any misconduct or unprofessional behavior of any kind. In fact, in connection with these court proceedings, defense counsel have conducted themselves at all times in a professional and ethical manner in representing their respective clients and the Court finds no basis for any personal attacks directed towards their conduct.

- 12 Defendants also provide factual background for the hearing in order to place it into a legal context.
- 13 In any event, neither the Remmer Affidavit nor the transcript has played a dispositive role in the Court's analysis herein.
- 14 Specifically, Section 1983 provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law ...

42 U.S.C. § 1983.

- The Court notes that, although defendants move for summary judgment on a procedural due process claim, plaintiff raised no such claim. Instead, his complaint and opposition papers clearly reflect that he brings a claim related to substantive due process. Indeed, even after Sloup clearly described his substantive due process claim in his opposition papers-without mentioning procedural due process-defendants failed to discuss the question of substantive due process in their reply papers. In any event, the Court has analyzed plaintiff's substantive due process claim and, as set forth below, finds that it survives summary judgment.
- In fact, at oral argument, counsel for the individual defendants conceded that a substantive due process violation would lie against defendants if they knew plaintiff's pots did not pose a hazard to navigation, but took unauthorized action against him based on personal animosity.
- The Court is aware that defendants dispute Sloup's version of events-with respect to all of plaintiff's claims-on the grounds that plaintiff's testimony lacks credibility. At oral argument, for instance, defendants urged the Court to discredit plaintiff's allegations on the basis of alleged factual inconsistencies within and between his testimony and affidavit. However, as the Court stated *supra* and at oral argument, the Court must eschew credibility assessments at the summary judgment stage, review the record in the light most favorable to plaintiff, and draw all reasonable inferences in his favor. A jury, not the Court, must resolve any such credibility issues.
- "While the Second Circuit has not resolved the question of whether there truly is a distinction between selective enforcement and class of one equal protection theories, courts in this circuit have repeatedly treated them as distinct theories with distinct elements of proof and have accordingly evaluated them as separate claims." *Bonenfant v. Kewer,* No. 3:05cv01508, 2007 U.S. Dist. LEXIS 64104, at *24 (D.Conn. Aug. 30, 2007) (collecting cases). The Court, therefore, has evaluated Sloup's class of one and selective enforcement claims separately.
- The Court notes that, as with Sloup's substantive due process claim, defendants failed to address plaintiff's class of one claim, despite plaintiff's discussion of this claim in the complaint and in his opposition brief.
- The Court is aware that the Second Circuit has not resolved the issue of whether plaintiffs bringing class of one claims must also demonstrate the "malice or bad faith" required in a selective enforcement claim, described *infra*. See Prestopnik, 2008 U.S.App. LEXIS 19612, at *5 n.1; Assoko v. City of New York, 539 F.Supp.2d 728, 735 n.7 (S.D.N.Y.2008) ("[T]he Second Circuit has repeatedly deferred the question of whether Olech eliminated the inquiry into defendant's bad faith intent...."). However, because the Court has found-as stated *infra*-that a rational jury could find that defendants acted with malice or bad faith, this unresolved legal question does not materially impact the Court's analysis of Sloup's class of one claim.
- Although one district court in the Second Circuit has stated that "the standard for 'similarly situated' when bringing a selective enforcement claim is the same as in a 'class of one' claim," *Dones v. City of New York*, No. 07 Civ. 3085, 2008 U.S. Dist. LEXIS 53681, at *28 (S.D.N.Y. July 9, 2008), the Court employs the slightly different formulations set forth by the Second Circuit for each claim. If anything-as the Court's analysis reflects in this Memorandum and Order-the two standards differ only in that the similarly situated standard for class of one claims is more stringent. Thus, because the Court found that summary judgment is precluded on that prong for the class of one claim, it follows that summary judgment is precluded on that prong for the selective enforcement claim. In any event, the Court has undertaken separate analysis for each claim.

- As defendants pointed out at oral argument, Sloup raised the third ground for his First Amendment claim for the very first time at oral argument. The Court is aware that Federal Rule of Civil Procedure 15(a) allows a party to amend its pleadings by leave of the court, and further directs that "leave shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). However, because the Court has analyzed this new allegation and, as set forth below, has determined that it does not survive summary judgment, permitting Sloup to amend his complaint to add this allegation would be futile.
- Indeed, the Court notes that Sloup's primary factual allegation in support of his First Amendment claim relates to a litigation that took place over thirty years ago-an event that, given the lack of any direct or indirect evidence of retaliation, is clearly too attenuated in time from the retaliatory acts alleged to give rise to an inference of causation. See, e.g., Ifill v. UPS, No. 04 Civ. 5963, 2008 U.S. Dist. LEXIS 54792, at *36-*37 (S.D.N.Y. July 17, 2008) (granting summary judgment to defendants on First Amendment retaliation claim because alleged retaliatory act took place fourteen months after protected activity).
- The Court notes that, even if Loeffler was merely the "Harbor Master" described in the Town Code, the relevant legislation (set forth *supra*) appears to afford Loeffler with complete authority to determine whether an object poses a hazard to navigation and, therefore, may invest Loeffler with sufficient policymaking power to give rise to municipal liability. As set forth below, the Court simply does not have sufficient information to determine as a matter of law the precise role Loeffler played.
- The Court is aware that, to the extent that the jury wholly credits Sloup's version of events, described *supra*-namely, that Loeffler imposed a legally unauthorized, blanket geographic prohibition over all of Sloup's commercial fishing activities in the waters of Islip-a jury could determine that Loeffler completely exceeded the bounds of the authority provided to him and, therefore, that Loeffler's actions did not reflect the policies of Islip. Under those circumstances, Islip might not be municipally liable for Loeffler's actions in this case.
- As a threshold matter, as described *supra*, Pomroy denied that he was "just following orders" when he issued the summons.
- The issue of qualified immunity does not affect Islip because "[m]unicipalities do not enjoy either absolute or qualified immunity from suit under Section 1983." White River Amusement Pub, Inc. v. Town of Hartford, 412 F.Supp.2d 416, 429 n.6 (D.Vt.2005), aff'd, 2007 U.S.App. LEXIS 7150 (2d Cir. Mar. 28, 2007) (citing Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 166 (1993)).
- The Court is aware that, "[b]ecause the focus of the qualified immunity inquiry is on the objective reasonableness of the defendant's actions, motivation does not come into play." Sound Aircraft Servs., Inc. v. Town of East Hampton, 192 F.3d 329, 334 (2d Cir.1999) (reversing district court's rejection of qualified immunity defense because district court took defendants' hostility toward plaintiff into account). Thus, the Court has not taken the individual defendants' alleged malicious motivations into account in determining whether the individual defendants are entitled to qualified immunity, but merely the individual defendants' allegedly arbitrary, irrational, and unauthorized conduct.
- The Court notes that, in order to determine the availability of the qualified immunity defense in this case at trial, the Court is prepared to follow the procedures set forth by the Second Circuit in *Zellner v. Summerlin*, 494 F.3d 344, 367-68 (2d Cir.2007). Specifically, although "the ultimate question of whether it was objectively reasonable for [defendants] to believe that [their] conduct did not violate a clearly established right, i.e., whether officers of reasonable competence could disagree as to the lawfulness of such conduct, is to be decided by the court," *id.* at 368, the jury must first "resolve[] any disputed facts that are material to the qualified immunity issue." *Id.* Further, "[t]o the extent that a particular finding of fact is essential to a determination by the court that the defendant is entitled to qualified immunity, it is the responsibility of the defendant to request that the jury be asked the pertinent question. *Id.* (citations omitted) (noting that "if the defendant does not make such a request, he is not entitled to have the court, in lieu of the jury, make the needed factual finding"). In particular, " 'the jury should decide these issues on special interrogatories.' " *Id.* (quoting *Warren v. Dwyer*, 906 F.2d 70, 76 (2d Cir.1990). Once the jury has determined these factual issues, the Court will-if necessary-afford defendants an additional opportunity to renew their motion with respect to qualified immunity. *See, e.g., Zellner*, 494 F.3d at 364.
- In addition, the Court is aware that defendants moved for summary judgment on the grounds that, although Crabs Unlimited suffered most of the alleged damages in this action, the business was not named as a plaintiff. As the Court stated at argument, because plaintiff may be entitled to nominal damages if the jury finds that Sloup's constitutional rights were violated, his failure to bring suit on behalf of his business merely goes to the issue of the level of damages to which plaintiff is entitled, but is not grounds for summary judgment. In any event, if Sloup wishes Crabs Unlimited to be a plaintiff in this action, he must amend the complaint to that end within sixty days of this Memorandum and Order.

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