

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

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WESTHAMPTON BEACH ASSOCIATES, LLC,

Plaintiff,

-against-

**MEMORANDUM OF
DECISION AND ORDER**
08-CV-1493 (ADS)(AKT)

ROBERT STREBEL, individually, MARK RAYNOR, individually, TIMOTHY LAUBE, individually, ORA BELLA BARNETTE, individually, JAMES KAMETLER, individually, CONRAD TELLER, individually, TONI-JO BIRK, individually, JOAN S. LEVAN, individually, HANK TUCKER, individually, RICHARD T. HAEFELI, individually, HERMAN BISHOP, individually, RALPH NEUBAUER, individually, VICTOR LEVY, individually, DAVID M. REILLY, individually, BARBARA RAMSEY, individually, SUNDY SCHERMEYER, individually, PAUL HOULIHAN, individually, KYLE COLLINS, individually, DAVID J.S. EMILITA, individually, and THE INCORPORATED VILLAGE OF WESTHAMPTON BEACH,

Defendants.

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APPEARANCES:

Campanelli & Associates, P.C.

Attorneys for the Plaintiff

129 Front Street

Mineola, NY 11501

By: Andrew J. Campanelli, Esq, Of Counsel

Devitt Spellman Barrett

Attorneys for Defendants Robert Strelbel, Mark Raynor, Timothy Laube, Ora Belle Barnette, James Kametler, Conrad Teller, Toni-Jo Birk, Joan S. Levan, Hank Tucker, Ralph Neubauer, Victor Levy, David M. Reilly, Barbara Ramsay, Sundy Schermeyer, Paul Houlihan, and the Incorporated Village of Westhampton Beach

50 Route 111

Smithtown, NY 11787

By: David H. Arntsen, Esq.

Jeltje DeJong, Esq., Of Counsel

Jaspan Schesinger Hoffman, LLP

Attorneys for Defendants Herman Bishop, Richard Haefeli, Kyle Collins, and David Emilita

300 Garden City Plaza, 5th Floor

Garden City, NY 11530

By: Maureen T. Liccione, Esq.

Laurel R. Kretzing, Esq., Of Counsel

SPATT, District Judge.

On September 12, 2008, Westhampton Beach Associates, LLC (“WBA”) filed a second amended complaint against the Incorporated Village of Westhampton Beach (the “Village”), numerous Village officials (the “Village Officials”) (collectively the “Village Defendants”), as well as current and former private attorneys and planning consultants that did work for the Village (the “Private Defendants”), alleging violations of 42 U.S.C. §§ 1983 and 1985. Presently before the Court are separate motions by the Village Defendants and the Private Defendants to dismiss the second amended complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). For the reasons that follow, the second amended complaint is dismissed in its entirety.

I. BACKGROUND

The following facts are drawn from the second amended complaint and the documents incorporated by reference. WBA is a real estate development company in the business of purchasing and developing properties on Long Island. In August of 2004, WBA began purchasing contiguous parcels of land within the Village of Westhampton Beach for the purpose of developing a 39 unit multi-family townhouse condominium. To that end, a WBA representative met with Mark Raynor, the Deputy Mayor of the Village, Timothy Laube, a member of the Village Board of Trustees, and Paul Houlihan, the Building and Zoning Administrator for the Village, to discuss the project.

According to WBA, the Village led its representative to believe that the Village would consider processing WBA's application for site approval of the project. WBA alleges that, notwithstanding this representation, the Village's intention was to delay its application to a point where WBA would abandon its efforts to develop the property. Indeed, WBA avers that Laube admitted to the WBA's representative that it was the Village's intention to "delay and delay forever until you [the plaintiff] went away." According to WBA, the Village set out to accomplish this objective by enacting a number of frustrating measures.

WBA alleges that the Village adopted a moratorium on building in April of 2005 that was enacted to prevent WBA from developing its project. According to

WBA, when it filed for an exemption to the moratorium, the Village denied the application without giving WBA a hearing as required by the Village Code. WBA also avers that after it submitted a site plan that included a structure with three floors, Houlihan denied its building application claiming that a third floor was prohibited under the Village Zoning Code. According to WBA, the Village enacted this amendment to the Village Zoning Code only after its application was denied.

WBA alleges that, at the time its application for site plan approval was filed, the Village Zoning Code provided that if a property owner sought to build a multi-family subdivision the property owner was required to provide recreation space or, in the alternative, pay a recreation fee. WBA alleges that in March of 2008, the Village amended its zoning code to require WBA to pay a recreation fee of \$1,000,000 notwithstanding the fact that its project included sufficient recreational area. WBA asserts that the Village also demanded, apparently as condition of approving the site application, that WBA grant the Village access over its property.

WBA further alleges that the Village's Architectural Review Board required WBA to spend \$100,000 in landscaping and "cosmetic details," on their project. Finally, WBA alleges that the Village treated differently Bruce Barnet, a "similarly situated" property owner who sought to build a 9 unit multi-family condominium one mile from WBA's property. In particular, WBA alleges that the Village gave it

eighteen months to complete its project while giving Barnet the same amount of time to finish a far less ambitious condominium.

In addition to a conspiracy claim pursuant to Section 1985, WBA's complaint sets forth, under Section 1983, alleged violations of its: (1) First Amendment right to petition the government for redress of grievances; (2) procedural and substantive due process rights; and (3) right to equal protection of the law.

II. DISCUSSION

A. Standard - 12(b)(6) Motion to Dismiss

In considering a 12(b)(6) motion to dismiss, “[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” Todd v. Exxon Corp., 275 F.3d 191, 198 (2d Cir. 2001) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)). In this regard, the Court must “accept all of the plaintiff’s factual allegations in the complaint as true and draw inferences from those allegations in the light most favorable to the plaintiff.” Starr v. Georgeson S’holder, Inc., 412 F.3d 103, 109 (2d Cir. 2005).

A complaint should be dismissed only if it does not contain enough allegations of fact to state a claim for relief that is “plausible on its face.” Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007). The Second Circuit has interpreted Twombly to require that a complaint “allege facts that are not merely consistent with the conclusion that the defendant violated the law, but which actively

and plausibly suggest that conclusion.” Port Dock & Stone Corp. v. Oldcastle Northeast, Inc., 507 F.3d 117, 121 (2d Cir. 2007). On a 12(b)(6) motion to dismiss, the Court must limit its “consideration to facts stated in the complaint or documents attached to the complaint as exhibits or incorporated by reference.” Nechis v. Oxford Health Plans Inc., 421 F.3d 96, 100 (2d Cir. 2005).

B. WBA’s Claims Under Section 1983

1. Standard - Section 1983

In order to state a valid claim under 42 U.S.C. § 1983, a plaintiff must show that the conduct in question deprived him of a right, privilege, or immunity secured by the Constitution or the laws of the United States, and that the acts were attributable at least in part to a person acting under color of state law. Washington v. County of Rockland, 373 F.3d 310, 315 (2d Cir. 2004). Under Section 1983, with certain exceptions, Monell v. Dep’t of Social Servs. of the City of N.Y., 436 U.S. 658 (1978), where a municipality’s liability is predicated solely upon the actions of its employees “if a claim fails as to the [municipal employees] because there was no violation of the plaintiff’s constitutional rights, then it necessarily fails as to the municipality as well.” Clubsides, Inc. v. Valentin, 468 F.3d 144, 161 (2d Cir. 2006).

2. As to the Private Defendants

Here, the Private Defendants argue, as a preliminary matter, that WBA’s claims under Section 1983 must be dismissed as against them because: (1) WBA has

failed to set forth their personal involvement in the alleged constitutional violations; and (2) attorneys and planning consultants who provide advice to a municipality are not acting under color of state law.

The Second Circuit has long recognized that plaintiffs asserting claims under Section 1983 must allege the personal involvement of each defendant. Back v. Hastings On Hudson Union Free School Dist., 365 F.3d 107, 122 (2d Cir. 2004) (citing McKinnon v. Patterson, 568 F.2d 930, 934 (2d Cir.1977)). Here, Richard Haefeli and Hermon Bishop are private attorneys retained by the Village. David Emilita and Kyle Collins are planning consultants and contractors hired by the Village.

WBA makes no effort to explain how Haefeli deprived him of his constitutional rights and the only allegation pertaining to Bishop is that he allegedly “demanded” that WBA make changes to the design of its project. WBA also fails to explain how the planning consultants, Collins and Emilita, were personally involved in the alleged constitutional violations. Thus, it is clear that WBA has failed to plead a required element under Section 1983 with respect to the Private Defendants. Nevertheless, even if WBA had met its burden at the pleading stage, it is equally clear that the Private Defendants were not acting under color of state law within the meaning of Section 1983.

It is well established that “[a] plaintiff pressing a claim of violation of his constitutional rights under § 1983 is . . . required to show state action.” Tancredi v. Metropolitan Life Ins. Co., 316 F.3d 308, 312 (2d Cir. 2006) (citing Rendell-Baker v. Kohn, 457 U.S. 830, 838, 102 S. Ct. 2764, 73 L. Ed. 2d 418 (1982)). Courts in the Second Circuit have consistently held that attorneys and consultants who provide advice to municipal entities are not acting under color of state law for the purposes of Section 1983. See Zdziebloski v. Town of East Greenbush, 336 F. Supp. 2d 194 (N.D.N.Y. 2004) (attorney that provided professional legal advice to a municipal board could not be held liable under Section 1983 where he was not a voting member of the board); R-Goshen LLC v. Village of Goshen, 289 F. Supp2d 441, 447 (S.D.N.Y. 2003) (finding that architectural design consultant who gave professional advice to municipality was not acting under color of state law); Omnipoint Commc’n, Inc. v. Comi, 233 F. Supp. 2d 388, 395 (N.D.N.Y. 2002) (telecommunications consultant who drafted local ordinance was not acting under color of state law); Goetz v. Windsor, 593 F. Supp. 526 (N.D.N.Y. 1984) (holding that the conduct of an attorney acting in his professional capacity while representing a municipal client does not constitute action under color of state law for the purposes of § 1983). WBA offers the Court no reason why the result should be different in this case. Accordingly, the second amended complaint is dismissed as against Haefeli, Bishop, Emilita, and Collins.

The Court now turns to WBA's allegations against the Village Defendants under Section 1983.

3. Section 1983 - First Amendment

WBA appears to contend that the Village violated its right to petition government for the redress of grievances by denying it a fair application process. It is certainly true that the First Amendment to the United States Constitution protects, among other precious liberties, the right "to petition the Government for a redress of grievances." However, "[t]he right to petition in general guarantees only that individuals have a right to communicate directly to government officials," and does not guarantee "that an elected official will necessarily act a certain way or respond in a certain manner to requests from his constituents." See Kittay v. Giuliani, 112 F. Supp. 2d 342, 354 (S.D.N.Y. 2000) (citing McDonald v. Smith, 472 U.S. 479, 482, 105 S. Ct. 2787, 86 L. Ed. 2d 384 (1985), and Minnesota State Bd. for Cmty. Colleges v. Knight, 465 U.S. 271, 285, 104 S. Ct. 1058, 79 L. Ed. 2d 299 (1984)).

Here, WBA does not and cannot allege that the Village prevented it from communicating any grievance or filing any application in support of its project. WBA's contention is rather that the application process was unfair and designed to induce it to abandon its project. Plainly, even if true, this allegation does not form the basis for a viable claim under the First Amendment. Accordingly, Count I of the second amended complaint is dismissed.

4. Section 1983 - Due Process

Although the second amended complaint is not a model of clarity in setting forth its precise claims under the Due Process Clause, WBA appears to allege, in essence, that the Village Defendants violated its procedural and substantive due process rights by depriving it of a fair zoning application process. To allege a violation of either a procedural or substantive due process right, a plaintiff must show, as a threshold matter, that the plaintiff possessed a constitutionally protected interest. See Clubsides, Inc. v. Valentin, 468 F.3d 144, 152 (2d Cir. 2006) (citing Harlen Assocs. v. Inc. Vill. of Mineola, 273 F.3d 494, 503 (2d Cir. 2001)); New York State Nat. Org. for Women v. Pataki, 261 F.3d 156, 163 (2d Cir.2001)). The Court's analysis of WBA's due process claims, then, must begin with an assessment of whether WBA has shown it has a constitutionally protected property interest in approval of its site plan.

It is well established that the Second Circuit "applies a 'clear entitlement' analysis to determine whether a landowner has a constitutionally cognizable property interest in the benefit sought." Clubsides, 468 F.3d at 152 (citing Walz v. Town of Smithtown, 46 F.3d 162, 168 (2d Cir.1995), and Zahra v. Town of Southold, 48 F.3d 674, 680 (2d Cir. 1995)). "This analysis focuses on whether the entity asserting the

property right has a ‘legitimate claim of entitlement,’ under applicable state law “to have its application granted.” Harlen Assocs., 273 F.3d at 504 (quoting RRI Realty Corp. v. Inc. Village of Southampton, 870 F.2d 911, 915 (2d Cir.1989)). The Second Circuit has explained that “[a]s a general rule, ‘entitlement turns on whether the issuing authority lacks discretion to deny the permit, i.e., is required to issue it upon ascertainment that certain objectively ascertainable criteria have been met.’” Clubsides, 468 F.3d at 153 (citing Natale v. Town of Ridgefield, 170 F.3d 258, 263 (2d Cir. 1999)).

The Court’s inquiry turns “primarily on the degree of discretion enjoyed by the issuing authority, not the estimated probability that the authority will act favorably in a particular case.” Clubsides, 468 F.3d at 152-53 (citing RRI Realty Corp., 870 F.2d at 918). The Second Circuit has advised district courts that “[i]n assessing a substantive due process claim in the context of land use regulation, the Court must be ‘mindful of the general proscription that federal courts should not become zoning boards of appeal’ to review non-constitutional land use determinations by local legislative and administrative bodies.” Honess 52 Corp. v. Town of Fishkill, 1 F. Supp. 2d 294, 300 (S.D.N.Y. 1998) (quoting Crowley v. Courville, 76 F.3d 47, 52 (2d Cir.1996), and Zahra, 48 F.3d at 679-80). Thus, “[i]n the land use context, the entitlement test is applied ‘with considerable rigor’ in order to prevent federal courts

from becoming substitutes for state courts in their review of local land use decisions. Honess 52 Corp., 1 F. Supp. 2d at 301 (citing RRI Realty Corp., 870 F.2d at 918).

New York Village Law Section 7-725-a(2)(a) provides a non-exhaustive list of factors that planning boards may consider in approving or denying a site plan including issues related to “parking, means of access, screening, signs, landscaping, architectural features, location and dimensions of buildings, adjacent land uses and physical features meant to protect adjacent land uses . . .” As is evident, Section 7-725-a vests village planning boards with considerable discretion in approving or disapproving site plan applications. This is clearly not a situation where WBA’s plan was entitled to approval upon compliance with a set of objective benchmarks. In this sense, WBA has failed to show a cognizable property interest because the discretion enjoyed by the Village defeats any legitimate claim of entitlement by WBA.

To the extent that WBA believed that the Village Defendants abused the review process, WBA’s recourse was to pursue an Article 78 proceeding in the state courts. Given the wide discretion planning boards enjoy, WBA cannot point to any conduct by the Village Defendants that rises to the level of a due process violation. See Natale, 170 F.3d at 263 (quoting Silverman v. Barry, 845 F.2d 1072, 1080 (D.C. Cir. 1988)) (“Only a substantial infringement of state law prompted by personal or group animus, or a deliberate flouting of the law that trammels significant personal or property rights, qualifies for relief under § 1983.”); see also Clubside, 468 F.3d at 158

(noting that “[i]t is not the role of the federal courts to protect landowners from merely arbitrary actions that are correctable by state remedies.”). Accordingly, Counts II and III are dismissed.

5. Section 1983 - Equal Protection

WBA also contends that the Village Defendants violated its rights under the Equal Protection Clause because the Village had no rational basis to treat it differently than a similarly situated property owner. The Equal Protection Clause is “essentially a direction that all persons similarly situated be treated alike.” City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). A plaintiff who does not allege discrimination on the basis of membership in a particular group may nevertheless proceed on an equal protection claim under the “class of one” theory recognized by the Supreme Court in Willowbrook v. Olech, 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000).

In Olech, the Supreme Court recognized that “plaintiffs state an equal protection claim where they allege that they were intentionally treated differently from other similarly-situated individuals without any rational basis.” Clubside, 468 F.3d at 159 (citing Olech, 528 U.S. 562). The Second Circuit has held that such “class-of-one plaintiffs must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves.” See Id. (citing Neilson v. D'Angelis, 409 F.3d 100, 104 (2d Cir. 2005)).

Here, WBA offers Bruce Barnet as a comparator. WBA alleges that Barnet owned property in the Village only one mile from WBA's property. WBA further alleges that the Village gave Barnet eighteen months to build a 9 unit multi-family townhouse condominium while affording WBA the same amount of time to build a 39 unit multi-family townhouse condominium. Although a court's inquiry into whether parties are similarly situated is generally fact-intensive, Clubsides, 468 F.3d at 159, WBA acknowledges that its project was nearly five times larger than Barnet's. In the land-use context, this significant difference in the size of the respective properties precludes a finding that the parties are similarly situated. See Olech, 528 U.S. at 565 (Breyer, J., concurring) (observing that the similarity requirement must be enforced with particular rigor in the land-use context because zoning decisions "will often, perhaps almost always, treat one landowner differently from another.").

Even assuming that WBA and Barnet were sufficiently similar, WBA's class-of-one cause of action still fails to state a claim because the Village site plan resolutions referenced in the second amended complaint clearly reveal that there was a legitimate planning objective underlying the disparate treatment. The Village Defendants point out that although WBA was given the same amount of time as Barnet to complete a larger project, WBA's site approval resolution contained a provision permitting liberal extensions of time while the site plan resolution approving Barnet's project contained a more limited extension provision.

In particular, the respective site approval resolutions indicate that WBA's eighteen month window to complete construction could be extended indefinitely by the Village while Barnet's resolution provided that he could only seek a limited extension of six months. Under the circumstances, it was rational for the Village Officials to grant the larger project an eighteen month window with a right to unlimited extensions while affording the smaller project the same window with a more limited extension provision. Accordingly, Count V is dismissed because WBA has failed to allege a plausible equal protection claim.

C. WBA's Claim Under Section 1985

In Count IV, WBA alleges that the Village Defendants conspired to violate his First and Fourteenth Amendment rights. To state a claim under 42 U.S.C. § 1985(3), a plaintiff must allege a conspiracy "for the purpose of depriving any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws." Iqbal v. Hasty, 490 F.3d 143, 176 (2d Cir. 2007). It is well-settled that the conspiracy must be motivated by some class-based animus. Id. (citing Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971)).

Here, WBA has failed to show that the alleged conspiracy was motivated by invidious class-based animus. However, even if WBA had made such a showing, its claim would clearly be barred by the intracorporate conspiracy doctrine. "The intracorporate conspiracy doctrine posits that the officers, agents and employees of a

single corporate or municipal entity, each acting within the scope of his or her employment, are legally incapable of conspiring together.” Simpson v. Town of Southampton, 2007 WL 1755749, at *7 (E.D.N.Y. 2007) (citing Herrman v. Moore, 576 F.2d 453, 459 (2d Cir.1978)). In this case, the Village Officials were incapable of conspiring together within the meaning of Section 1985 because all were Village employees and the alleged conspiracy consisted solely of actions taken within the scope of their employment. Accordingly, Count IV is dismissed.

III. CONCLUSION

Based on the foregoing, it is hereby

ORDERED, that the second amended complaint is dismissed as against Richard Haefeli, Hermon Bishop, David J.S. Emilita, and Kyle Collins, and it is further,

ORDERED, that the Village Defendants’ motion to dismiss the second amended complaint is GRANTED, and it is further,

ORDERED, that the second amended complaint is dismissed in its entirety, and it is further,

ORDERED, that the Clerk of the Court is directed to close this case.

SO ORDERED.

Dated: Central Islip, New York
February 19, 2009

/s/ Arthur D. Spatt
ARTHUR D. SPATT
United States District Judge