UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DÉJÀ VU OF NASHVILLE, INC. and THE PARKING GUYS, INC.,	)	
Plaintiffs,	)	
v.	)	**No. 3:18-cv-00511**
	)	**JUDGE CRENSHAW**
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.,	)	
Defendants.	)	

THE METRO DEFENDANTS' MOTION TO DISMISS AND MEMORANDUM OF LAW IN SUPPORT

SUMMARY

The Metro Defendants (the Metropolitan Government and Councilman O'Connell) hereby submit this Memorandum of Law in support of their motion to dismiss under FED. R. CIV. P. 12(b)(1) and (6).

- The § 1983 claims should be dismissed because:

  - There can be no due process violation where there is no constitutionally-protected property interest at stake (such as the discretionary benefit at-issue here, in the form of a valet location permit). As for their procedural due process claims, Plaintiffs have not alleged how or why the state level proceedings in which they are participating are not adequate to address their concerns.

  - There can be no First Amendment retaliation claim where there was no adverse action taken against the party whose First Amendment rights are at-issue (Déjà Vu). In

sum, it was The Parking Guys who had their permit denied by the Traffic and Parking Commission, not Déjà Vu. Also, there are no facts alleged that would show that the permit-denial was motivated by any animus against the adult-entertainment aspect of the operation; instead, the facts alleged in the Complaint (as well as those found in the complaint-exhibits) all bear out the fact that traffic and safety issues motivated the opposition to the permit.

- There are no allegations that any of the alleged injuries resulted from an unconstitutional official policy or custom of the Metropolitan Government.

- The §1985 claims should be dismissed because there are no allegations that the alleged discrimination was based on race or membership in some other protected class defined by inherent personal characteristics.

- In addition to the arguments outlined above, the claims against Councilman O'Connell should also be dismissed based upon legislative immunity.

DISCUSSION

I. Plaintiffs' claims against Metro should be dismissed.

Plaintiffs bring claims against Metro under § 1983, alleging that their substantive and procedural due process rights were violated through the denial of The Parking Guys' valet permit, and also alleging First Amendment retaliation. (Compl., Doc. No. 1, PageID# 20.)

A. § 1983 – due process.

1. Substantive due process -- Compl., Doc. No. 1, ¶ 82.a.

To bring a substantive due process claim a plaintiff must possess a constitutionally-protected property interest. *Silver v. Franklin Township BZA*, 966 F.2d 1031, 1036 (6th Cir.1992). In the context of government approvals, such a property right exists only if a plaintiff

has a "legitimate claim of entitlement" or a "justifiable expectation" in the governmental approval that he seeks. *Triomphe Investors v. City of Northwood*, 49 F.3d 198, 202-03 (6th Cir.1995).

"The law is clear that a party cannot have a property interest in a discretionary benefit…" *EJS Properties, LLC v. City of Toledo*, 698 F.3d 845, 857 (6th Cir. 2012). If the board or commission has discretion to deny the permit, then the applicant does not have a "legitimate claim of entitlement" or a "justifiable expectation" in the approval of his permit. *Silver*, 966 F.2d at 1036; *see also*, 26 AM. JUR. 2D § 139 ("[A] property owner does not have a protected property interest in a permit or applying for a permit, and thus, the denial of a permit does not constitute a taking or violate due process where the decision to grant or deny a permit is in the discretion of the governing authority.") (footnotes omitted);

Here, the Traffic and Parking Commission had the discretion under the Metro Code to deny the valet permit at-issue. (Metro Code § 12.41.030 - Valet location permits, Pls' Ex. 1, Doc. No. 1-3, Page ID# 29.) Under § 12.41.030, a valet location permit will only be issued when the Commission has approved it, and the Commission will only approve such a permit if it determines that the valet-permit location would not be detrimental to the public safety, health and welfare. (*Id.*, Metro Code § 12.41.030; *see also* Memo. & Order, 7/6/18, Doc. No. 18-1, PageID# 280.[1])

Because the approval or disapproval of a valet location permit lies in the discretion of the Commission, the Plaintiffs did not have any property interest in such a permit that would give

[1] Matters of public record and orders (such as this order from Chancellor Young), as well as items appearing in the record, and exhibits attached to the complaint may be taken into account in ruling on a Rule-12 motion. *Blankenship v. City of Crossville*, No. 2:17-CV-00018, 2017 WL 4641799, *2 (M.D. Tenn. Oct. 17, 2017) (CRENSHAW, C.J.)

rise to a due process claim. *EJS Properties*, 698 F.3d at 857 ("a party cannot have a property interest in a discretionary benefit"); *Silver*, 966 F.2d at 1036.[2]

Thus, Plaintiffs cannot make any claim that they had an "entitlement" to the permit (*Triomphe Investors* at 202-03), and, therefore, their substantive due process claim should be dismissed.[3]

2. Procedural due process -- Compl., Doc. No. 1, ¶ 82.a.

Likewise, a plaintiff must have a constitutionally-protected property interest in order to bring a *procedural* due process claim, as well. *Jefferson v. Jefferson Cty. Pub. Sch. Sys.*, 360 F.3d 583, 587–88 (6th Cir. 2004). As discussed above, the Plaintiffs' lack of a property interest in the permit which they sought means that their procedural due process claims should also be dismissed.

Additionally, in the procedural due process context, a plaintiff must allege sufficient facts to show that the state level remedies are inadequate. *Jefferson*, 360 F.3d at 587–88 (procedural due process) ("Plaintiff may not seek relief under Section 1983 without first pleading and proving the inadequacy of state or administrative processes and remedies to redress her due process violations.")

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[2] Another reason that Plaintiff Déjà Vu does not have any property interest in the valet location permit is because Déjà Vu was not the applicant for the permit. Instead, Plaintiff The Parking Guys was the applicant. (Compl., Doc. No. 1, ¶ 35, "Or on about May 25, 2017, The Parking Guys applied to Metro's Public Works Department for permission to operate a valet service…")

[3] Without a property interest at stake, there is no particularized injury alleged here (more than mere speculation) that would give rise to Plaintiffs' having standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). And lack of standing is a subject-matter jurisdictional problem for the Plaintiffs under Rule 12(b)(1). *E.g.*, *Kepley v. Lanz*, 715 F.3d 969, 972 (6th Cir. 2013).

Here, Plaintiffs have made no effort to plead any facts to support the notion that the state level remedies made available to them, including a writ of certiorari review process through Chancery Court (Memo. & Order, Doc. No. 18-1) are inadequate. In fact, they plead the opposite: that they are currently taking advantage of the state level remedies made available to them. (Compl., Doc. No. 1, ¶ 77-78.) Therefore, their procedural due process claims should be dismissed for this reason as well.

B. § 1983 – First Amendment retaliation.

Plaintiffs allege that Metro violated their First Amendment rights by "denying The Parking Guys' requested Valet Permit to service Deja Vu due to disagreement with or distain for Deja Vu's First Amendment protected speech and expression." (Compl., Doc. No. 1, ¶ 82.b.)

"In order to adequately plead a First Amendment retaliation claim, a plaintiff must allege: (1) the plaintiff engaged in constitutionally protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) the adverse action was motivated at least in part by the plaintiff's protected conduct." *Wurzelbacher v. Jones-Kelley*, 675 F.3d 580, 583 (6th Cir. 2012).

1. Adverse action.

"[W]hen a plaintiff's alleged adverse action is 'inconsequential,' resulting in nothing more than a 'de minimis injury,' the claim is properly dismissed as a matter of law." *Wurzelbacher* at 584 (citation omitted).

Here, the Plaintiffs seem to be alleging that the First Amendment rights at stake are transferrable, i.e., from Déjà Vu to The Parking Guys. Importantly, however, any First Amendment rights at-issue in this case are Déjà Vu's, not The Parking Guys'. It was not Déjà Vu's permit application that was denied. Rather, it was The Parking Guys'. (Compl., Doc. No.

1, ¶ 82.b.) Furthermore, as Defendant Schipani points out, there are no allegations in the Complaint explaining why Déjà Vu could not simply secure the services of another valet company. (Schipani Memo. in Supp. Mot. to Dismiss, Doc. No. 18, PageID# 254.)

Because Déjà Vu has not alleged any facts giving rise to an adverse action *against Déjà Vu* – and has instead only pointed to the denial of someone else's permit as the injury here, then Déjà Vu has only pointed to an inconsequential, "de minimis injury," at best (*Wurzelbacher* at 584), and, for this reason, this claim should be dismissed as a matter of law.

2. Causation.

To survive a motion to dismiss, the Complaint must also allege sufficient facts to show that the alleged adverse action "was motivated at least in part by the plaintiff's protected conduct." *Wurzelbacher*, 675 F.3d 580, 583 (6th Cir. 2012); cited in *Top Flight Entm't, Ltd. v. Schuette*, 729 F.3d 623 (6th Cir. 2013).

In *Top Flight*, there were specific factual allegations in the complaint which directly connected the club's First Amendment protected activity and the Bureau's decision to deny all party licenses to organizations seeking to hold a party at the club. Accordingly, the Court held that sufficient facts related to causation had been alleged to defeat the motion to dismiss. *Top Flight* at 631 (where the allegations included "the Bureau received many complaints that charitable gaming events should not be conducted at 'a topless bar[,]' " leading to Defendants' policy denying all millionaire-party licenses to organizations seeking to hold a millionaire party at Flying Aces.")

By contrast, in our case (assuming for the moment that Déjà Vu could ever get past the "adverse action" hurdle since The Parking Guys is the entity whose permit was denied) there are no such facts found in the Complaint which would draw any similar connection between Déjà

Vu's First Amendment protected activities and action by the Traffic and Parking Commission. In fact, the allegations and complaint-exhibits pertaining to what was said to the Commission about motivating factors bears out that it was traffic and safety concerns on everyone's mind (*see, e.g.*, Compl. Exs. 12, 14, 15, 17, 19, & 20) – not the need to rally against adult entertainment.

Therefore, Plaintiffs' § 1983 claims should be dismissed.[4]

C. § 1985.

Plaintiffs allege that the acts of Metro, O'Connell, Schipani, and Molette "were part of single plan to orchestrate the improper denial of the Valet Permit requested by the Parking Guys to service Deja Vu." (Compl. ¶ 79.)

Metro hereby joins, and adopts by reference, the argument presented by Defendant Schipani found in Section III.C.1. of her memorandum in support of her motion to dismiss. (Doc. No. 18, PageID# 251-52.) As Defendant Schipani points out, Plaintiffs have failed to state a claim under § 1985 because they have not alleged any class-based, discriminatory animus.

To bring a § 1985 claim, a plaintiff must allege discrimination based on race or membership in a protected class defined by inherent personal characteristics. *Blankenship v. Crossville*, No. 2:17-CV-00018, 2017 WL 4641799, *5 (M.D. Tenn. 2017) (CRENSHAW, C.J.) ("The Sixth Circuit has ruled that § 1985(3) only applies to discrimination based on race or membership in a class which is one of those so-called 'discrete and insular' minorities that receive special protection under the Equal Protection Clause because of inherent personal

[4] Additionally, Plaintiffs have failed to allege that any of their alleged injuries resulted from an unconstitutional official policy or custom of the Metropolitan Government; therefore, the §1983 claims against Metro should be dismissed for this reason as well under *Monell*, 436 U.S. 658 (1978). *See Shoultes v. Laidlaw*, 886 F.2d 114, 119 (6th Cir. 1989).

characteristics."), quoting *McGee v. Schoolcraft Cmty. Coll.*, 167 Fed.Appx. 429, 435 (6th Cir. 2006) (citation omitted).

Because there are no such allegations here involving race, or other protected class based on personal characteristics, the § 1985 claims should be dismissed.[5]

II. Plaintiffs' claims against Councilman O'Connell should be dismissed.

A. § 1983.

Councilman O'Connell is not specifically named in the sections of the Complaint addressing § 1983. (Compl., ¶¶ 82-83.) To the extent there are any § 1983 claims against Councilman O'Connell, then those claims should be dismissed for the reasons discussed in Sections I.A. and B. above.

B. § 1985.

Similarly, the § 1985 claims made against Councilman O'Connell should be dismissed for the same reasons discussed in Section I.C. above.

C. Legislative immunity.

The Supreme Court has emphasized that any restriction on a legislator's freedom undermines the public good by interfering with the rights of the people to representation in the democratic process. *Spallone v. United States*, 493 U.S. 265, 279 (1990) (and cases cited therein) (holding that actions taken in a representative capacity are protected).

"Absolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.'" *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) (citation omitted).

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[5] Additionally, without the existence of a protected class, the Plaintiffs do not have standing, and lack of standing is jurisdictional. *See* fn. 3 above and *Kepley*, 715 F.3d at 972 (6th Cir. 2013).

"Meeting with 'interest' groups, professional or amateur, regardless of their motivation, is a part and parcel of the modern legislative procedures through which legislators receive information possibly bearing on the legislation they are to consider." *Bruce v. Riddle*, 631 F.2d 272, 280 (4th Cir. 1980), cited with approval in *Shoultes v. Laidlaw*, 886 F.2d 114, 117 (6th Cir. 1989); *see also Cass v. Ward*, 114 F.3d 1186 (6th Cir. 1997) (Table) (unpublished) (where the Court held that the trial court properly dismissed multiple claims, including §§ 1983 and 1985 claims, on the basis of legislative immunity).

Here, Plaintiffs bring § 1985 claims against Councilman O'Connell stemming from his introducing legislation (Compl., ¶ 23), which was later withdrawn (Compl., ¶ 27) and from his sending an email to the Public Works Department and the Traffic and Parking Commission (Compl., ¶¶ 64-66) in support of his constituents' interests in District 19. (Email, Compl. Ex. 20, Doc. No. 1-22, PageID# 139, "I'm writing in support of the position of the Midtown Church Street Business and Residential Association… Freddie O'Connell, Metro Councilman, District 19.")

Because Plaintiffs' § 1985 claims arise out of Councilman O'Connell's actions in sponsoring local legislation, meeting with constituents, and then sending a letter on their behalf (Compl., ¶¶ 23, 27, & 64-66), such claims should be dismissed under the federal legislative immunity doctrine. *Bogan*, 523 U.S. at 54 (1998) (local legislators are absolutely immune).[6]

[6] Because there is no underlying constitutional violation here, as discussed above in Section I, Councilman O'Connell would also be entitled to qualified immunity. *Guindon v. Twp. of Dundee, Mich.*, 488 Fed. Appx. 27, 35 (6th Cir. 2012).

CONCLUSION

For the foregoing reasons, the claims against the Metro Defendants should be dismissed.

Respectfully submitted,

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Certificate of Service

This is to certify that a copy of the foregoing was served on August 2, 2018, via the Court's CM/ECF system to:

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