UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COSIMO PANETTA and MIRELLA PANETTA, Plaintiffs, v. THE VILLAGE OF MAMARONECK, JOHN WINTER, in his individual and official capacity, RICHARD SLINGERLAND, in his individual and official capacity, CHRISTIE DERRICO in her official capacity, JANET INSARDI in her individual and official capacity, and individually, STUART TIEKERT and CHARLES MORELLI, Defendants.	**MEMORANDUM DECISION** 11 CV 4027 (VB)

Briccetti, J.:

Plaintiffs Cosimo and Mirella Panetta bring this civil rights action against defendants Village of Mamaroneck, John Winter, Richard Slingerland, Christie Derrico, Janet Insardi, Stuart Tiekert, and Charles Morelli asserting claims for individual and conspiratorial violations of their right to substantive due process, pursuant to 42 U.S.C. § 1983. Plaintiffs also assert a First Amendment retaliation claim and several causes of action under New York law. Before the Court are motions to dismiss filed by defendants Winter, Slingerland, Derrico, Insardi, Tiekert and Morelli pursuant to Federal Rule of Civil Procedure 12(b)(6). (Docs. #11, #15, #22).[1]

For the reasons set forth below, the motions are GRANTED, although plaintiffs are granted leave to file an amended complaint as to their substantive due process claim against defendants Winter, Slingerland, and Insardi.

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[1] Defendant Village of Mamaroneck has filed an answer.

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and §1367(a).

BACKGROUND

For purposes of ruling on a motion to dismiss, the Court accepts all factual allegations of the complaint as true.

Plaintiffs Cosimo Panetta and Mirella Panetta are the owners of real property located in the Village of Mamaroneck (the "Village") at 514 Pine Street, Mamaroneck, New York (the "premises"). The moving defendants are various former and present officials of the Village (John Winter, Richard Slingerland, Christie Derrico, and Janet Insardi), and two neighbors of the premises who are private individuals (Stuart Tiekert and Charles Morelli).

Plaintiffs purchased the premises on July 2, 2001, and the installation of a drainage system was required to develop it. Because Pine Street is a public road, the Village suggested securing an easement from the adjoining neighbors at the rear of the premises. This would permit a hard pipe drainage system to be tied into the existing municipal system. The adjoining owners declined to grant the necessary easement. The then-Village Engineer, Dolph Rotfield, subsequently accepted an alternative drainage plan for the premises. In August 2001, plaintiffs were informed that an application should be made to the planning board for a street opening permit to install the requisite utilities to develop the premises. Plaintiffs filed the application on August 28, 2001.

Tiekert, as representative of neighboring property owners, voiced concern over the application and made a Freedom of Information Law ("FOIL") request regarding the project. At that time, Frank Fish, of Buckhurst Fish & Jacquemart, Inc., planning consultants for the Village, advised the planning board about the approved alternative drainage plan for the project. The planning board adopted a resolution approving the alternative drainage system on November 29,

2001 (the "resolution"),[2] and the street opening permit was issued on December 20, 2001. Plaintiffs posted a performance bond prior to commencing work as required by the resolution.

Subsequent to the planning board's approval, the surrounding neighbors began to question the progress of the work, focusing mainly on the approved drainage plans. Revised site plan drawings were submitted to Rotfield by plaintiffs' engineer, Benedict Salanitro, and in February 2002, Rotfield informed the building department that plaintiffs complied with the specified changes. On March 5, 2002, the building department issued plaintiffs a building permit for the construction of a single-family dwelling on the premises, and subsequently issued a temporary Certificate of Occupancy ("CO"). Around the same time, KW Furey Engineering ("Furey") replaced Rotfield as village engineer.

During the fall of 2002, Tiekert again voiced concern about compliance issues with the resolution. On December 30, 2002, in response to Tiekert's complaints, then acting village manager Robert Yamuder advised plaintiffs that certain issues had to be addressed prior to the Village's issuance of a permanent CO. Yamuder informed Tiekert that the building department would not issue a permanent CO for the premises without review and approval of "as built" drawings. Tiekert continued to state his concern about flaws in the drainage system in a letter dated February 26, 2003. In response, Salanitro wrote a letter to Yamuder affirming that the drainage system conformed to the plans and specifications approved by the planning board.

Furey also addressed Tiekert's complaints in correspondence to various Village managers between August 2003 and March 2007. Furey stated plaintiffs constructed the drainage system

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[2] The alternative system approved by the planning board was a drywell drainage system.

in compliance with the approved designs, and the premises had been constructed in accordance with zoning regulations and the state building code.

On August 27, 2009, Winter (the Village's Building Official) wrote a letter to the plaintiffs asserting that unless plaintiffs took "immediate steps to resolve the drainage issue to the Village's satisfaction, [Winter would] have to revoke the temporary certificate of occupancy." On August 28, 2009, in response to a letter from Morelli, Slingerland (the Village Manager) told Morelli the Village had informed plaintiffs that if the drainage issues were not resolved satisfactorily, the temporary CO would be revoked. Morelli reminded Slingerland on October 29, 2009, that plaintiffs' failure to resolve the issues would result in revocation. On October 30, 2009, Winter again warned plaintiffs that failure to resolve the situation would result in revocation of the temporary CO.

After receiving Winter's October 30 letter, plaintiffs' counsel responded on November 6, 2009, addressing plaintiffs' compliance with the resolution, plans, and specifications filed with the building department. Counsel followed up on November 30, 2009. Insardi (the Village Attorney) responded on December 3, 2009, stating "the project as built deviates from the project as approved by the planning board," and "failure to address the issues will result in revocation of the temporary certificate of occupancy."[3]

Plaintiffs' counsel also demanded Winter issue the permanent CO. Winter asserted it was not within his power to accept the road as completed, and would need the Department of Public Works or the board of trustees to inform him that the Village had accepted the road. Winter

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[3] The complaint alleges that Insardi was succeeded by Derrico as Village Attorney, but makes no other allegations as to Derrico's involvement in the events at issue.

advised counsel that an application needed to be filed with the planning board to determine compliance with the resolution. Plaintiffs filed the application, but when the status of the application went unheard, plaintiffs' counsel contacted the chairman of the planning board, Bob Galvin, who stated that approval of Pine Street was not the planning board's responsibility. Plaintiffs contend defendants were attempting to coerce them into performing a "private public works project" by insisting a hard pipe drainage system be installed, which was not required by the resolution.

In May 2011, a year after filing the application with the planning board, plaintiffs' counsel received a phone call from the secretary of the planning board informing him that Winter had directed the application to be placed on the planning board's agenda. Plaintiffs' counsel requested that the application be removed. Plaintiffs allege Tiekert and Morelli had recently appeared at regularly scheduled meetings of the Village board of trustees claiming plaintiffs lied to the planning board.

The plaintiffs' temporary CO has not been revoked. Plaintiffs thereafter filed this action.

DISCUSSION

I. Standard of Review

The function of a motion to dismiss is "merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." Ryder Energy Distrib. v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984) (internal quotations omitted). In deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim, the Court evaluates the sufficiency of the complaint under the two-pronged approach suggested by the Supreme Court in Ashcroft v. Iqbal. See 556 U.S. 662, 129 S. Ct. 1937, 1950 (2009). First, "[t]hreadbare recitals of the elements of a cause of action, supported by mere

conclusory statements," are not entitled to the assumption of truth and are thus not sufficient to withstand a motion to dismiss. Id. at 1949. Second, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." Id. at 1950.

To survive a Rule 12(b)(6) motion to dismiss, the allegations in the complaint must meet a standard of "plausibility." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 564 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S. Ct. at 1949. "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." Id.

II. Substantive Due Process Claim (Count One)

Plaintiffs assert a violation of substantive due process claim against the individual municipal defendants Winter, Slingerland, Derrico, and Insardi pursuant to 42 U.S.C. § 1983. To assert such a claim, plaintiffs must plead: (1) that "a constitutionally cognizable property interest is at stake," and (2) defendants' "alleged acts against [the] land were arbitrary, conscience-shocking, or oppressive in the constitutional sense, not simply incorrect or ill-advised." Ferran v. Town of Nassau, 471 F.3d 363, 369-71 (2d Cir. 2006) (internal quotations omitted).

To establish a constitutionally cognizable property interest, plaintiffs must demonstrate a clear entitlement to the benefit in question. Villager Pond, Inc. v. Town of Darien, 56 F.3d 375, 378 (2d Cir. 1995). In certain circumstances a party may have a constitutionally protectable property interest in a certificate of occupancy. Zahra v. Town of Southold, 48 F.3d 674, 681 (2d Cir. 1995) (internal quotations omitted). Because property interests are "not created by the

Constitution," but rather "are defined by existing rules or understandings that stem from an independent source such as state law," the Court must rely on state law when deciding whether a benefit qualifies as a protectable property interest under the Fourteenth Amendment. Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).

Under New York Law, a vested right in a certificate of occupancy 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 of the property. Frooks v. Town of Cortlandt, 997 F. Supp. 438, 450 (S.D.N.Y. 1998) (internal quotations omitted). However, neither the issuance of the certificate, nor the landowner's substantial changes and expenditures, standing alone, will establish a vested right. Id. at 450-51. "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." Id.

It is undisputed that the building department issued plaintiffs a building permit for the construction of the premises, and, upon completion, a temporary CO.[4] Plaintiffs assert Furey stated they complied with the planning board resolution and with required zoning regulations and the state residential building code. However, such an assertion is not sufficiently fact-specific to plead a constitutionally cognizable property interest. Although plaintiffs seek damages in excess of $500,000, sufficient facts have not been pleaded in the complaint alleging that municipal action rendered the improvements valueless. See Ceja v. Vacca, 2011 WL 6097143 at 5 (S.D.N.Y. 2011) (plaintiff's claim that he invested a "substantial" sum of money is a conclusory

[4] The building permit was issued on March 5, 2002. The temporary CO was issued on December 16, 2002.

statement that does not survive a motion to dismiss); Frooks v. Town of Cortlandt, 997 F. Supp. at 451 (plaintiffs failed to allege a property interest in certificate of occupancy because they made only "unsubstantiated allegations…that the alleged revocation of the certificate has resulted in 'five million dollars' in damages").

Moreover, plaintiffs' assertion that posting of a performance bond pursuant to the resolution created a cognizable property right is without merit.[5] Plaintiffs rely on Village Law §7-736(a) stating in part:

> No permit for the erection of any building shall be issued unless a street or highway giving access to such proposed structure has been duly placed on the official map or plan. . . . Before such permit shall be issued such street or highway shall have been suitably improved to the satisfaction of the planning board, or alternatively, and in the discretion of such board, a performance bond sufficient to cover the full cost of such improvement as estimated by such board or other appropriate village departments designated by such board shall be furnished to the village by the owner. . . .

N.Y. Village Law §7-736(a) (emphasis added). The language specifically addresses the issuance of building permits, not certificates of occupancy. Sorg v. Zoning Board of Appeals of Vil. /Town of Mount Kisco, 248 A.D.2d 622 (2d Dep't 1998) ("Village Law § 7–736 authorizes a

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[5] Plaintiffs cite Incorporated Village of Northport v. Guardian Federal Savings & Loan, 87 Misc. 2d 344 (N.Y. Sup. Ct. 1976), in support of the position that posting of the performance bond resulted in a cognizable property right in the CO. However, this case is inapplicable here because the court only considered the bonds posted as but one factor in determining whether retrospective imposition of a town code, declared illegal following plat approval for the construction of a residential community, should apply. The court stated that the defendants' "substantial investment in building construction in reliance upon plats approved and filed under an existing State statute, an apparently regular ordinance, and building permits duly issued by the building inspector" precluded retrospective imposition of the illegal code as a device to prevent the use of the house.

village to require a property owner to improve the street or means of access off-site as a prerequisite to issuance of a building permit.") (internal citations omitted). The performance bond was posted in lieu of obtaining approval from the planning board prior to the issuance of the building permit. As such, the performance bond permitted plaintiffs to obtain a building permit and not a vested right to a permanent CO.

In addition, to succeed on a Section 1983 claim against the individual defendants, plaintiffs must show that defendants, acting under the color of state law, deprived plaintiffs of a constitutional right. Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982). "[P]ersonal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983," and can occur by direct participation in the alleged violation, a supervisory official's failure to remedy a wrong, a supervisory official's creation of a policy or custom under which unconstitutional acts occurred, or through a supervisory official's gross negligence in managing his subordinates. Dyno v. Village of Johnson City, 240 F. App'x. 432, 434 (2d Cir. 2007).

Because plaintiffs have so far failed to plausibly allege a constitutionally cognizable property right in the CO for the single-family dwelling, they cannot sustain a claim that defendants deprived them of that right. Therefore, defendants' motion to dismiss plaintiffs' substantive due process claim is granted. Moreover, although the complaint contains allegations of the personal involvement of defendants Winter, Slingerland, and Insardi, it contains no such allegations against Derrico.

Accordingly, the substantive due process claim is dismissed without prejudice as to defendants Winter, Slingerland, and Insardi, and with prejudice as to defendant Derrico.

III. Conspiracy Claim Against Tiekert and Morelli Under 42 U.S.C. § 1983 (Count Two)

Plaintiffs further allege that Tiekert and Morelli, the neighbors who are not municipal officials, conspired with the defendant municipal officials to violate their civil rights. To survive a motion to dismiss on a Section 1983 conspiracy claim, plaintiffs must allege: "(1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." Pangburn v. Culbertson, 200 F.3d 65, 72 (2d Cir. 1999). A plaintiff is not required to list the place and date of defendants' meetings and the summary of their conversations when pleading conspiracy, but the pleadings must present facts tending to show agreement and concerted action. Ciambriello v. County of Nassau, 292 F.3d 307, 324 (2d Cir. 2002) (internal citations omitted).

The complaint asserts Tiekert made a FOIL request and further inquired by letter as to compliance issues pertaining to the resolution, and that Morelli also wrote a letter inquiring about the resolution, to which Village officials responded. Plaintiffs further allege Tiekert and Morelli appeared at regularly scheduled meetings of the Village's board of trustees claiming plaintiffs "lied to the Planning Board." These assertions are insufficient to support plaintiffs' conspiracy claim. See Ciambriello, 292 F.3d at 325 ("complaints containing only conclusory, vague, or general allegations that the defendants have engaged in a conspiracy to deprive the plaintiff of his constitutional rights are properly dismissed; diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct.")

Because plaintiffs cannot plausibly allege a Section 1983 conspiracy claim, defendants Tiekert and Morelli's motion to dismiss the conspiracy claim is granted with prejudice.

IV. First Amendment Retaliation Claim (Count Three)

Plaintiffs purport to allege a First Amendment retaliation claim by asserting that defendants' continued failure to issue the CO was carried out in retaliation for plaintiffs' petitioning of the village for issuance of the permanent CO.

The right to complain to public officials and to seek administrative and judicial relief is protected by the First Amendment. Franco v. Kelly, 854 F.2d 584, 589 (2d Cir. 1988); see United Mine Workers v. Illinois Bar Assoc., 389 U.S. 217, 222 (1967) (the right "to petition for a redress of grievances [is] among the most precious of liberties safeguarded by the Bill of Rights" and is "intimately connected . . . with other First Amendment rights of free speech and free press"). To state a First Amendment retaliation claim, plaintiffs must establish: (1) they have an interest protected by the First Amendment; (2) defendants' actions were motivated or substantially caused by their exercise of that right; and (3) defendants' actions effectively chilled the exercise of their First Amendment rights. Kuck v. Danaher, 600 F.3d 159, 168 (2d Cir. 2010) (quoting Curley v. Village of Suffern, 268 F.3d 65, 73 (2d Cir. 2001)).

Plaintiffs have adequately alleged an interest explicitly protected by the First Amendment, which is the right to petition the government for the redress of grievances. As to the second element, retaliatory motive, the Second Circuit has noted that, "[t]he ultimate question of retaliation involves a defendant's motive and intent, both difficult to plead with specificity in a complaint." Gagliardi v. Village of Pawling, 18 F.3d 188, 195 (2d Cir. 1994). "It is sufficient to allege facts from which a retaliatory intent on the part of the defendants may reasonably be inferred." Id. at 195. Rule 9(b) of the Federal Rules of Civil Procedure, which sets forth a heightened pleading standard for allegations of fraud, provides that "[m]alice, intent,

knowledge and other conditions of mind . . . may be averred generally." Id. Here, plaintiffs have pleaded sufficient facts to infer defendants' retaliatory intent.

However, the Court must also determine whether plaintiffs' speech was actually chilled by the alleged retaliatory conduct. Saleh v. City of N.Y., 2007 WL 4437167 1, 3 (S.D.N.Y. 2007). Actual chilling must be established by "a change in behavior" because "a subjective chill cannot serve as a substitute for a specific objective harm." Aretakis v. Durivage, 2009 WL 249781 at 21 (N.D.N.Y. 2009) (citing Laird v. Tatum, 408 U.S. 1, 13-14 (1972)).

Plaintiffs fail to assert a change in behavior that resulted in an actual chilling. Following Winter's letter threatening to revoke the temporary CO, plaintiffs responded by letter on two additional occasions. Moreover, plaintiffs' counsel contacted Galvin after filing the application at Winter's suggestion, and thereafter Winter directed the application be placed on the planning board's agenda. Plaintiffs have thus failed sufficiently to plead a change in behavior. See Curley v. Village of Suffern, 268 F.3d 68, 73 (2d Cir. 2001). ("[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.").

Because plaintiffs cannot plausibly allege a First Amendment retaliation claim, that claim is dismissed with prejudice.

V. Punitive Damages and Attorneys' Fee Claims (Counts Four and Five)

Plaintiffs seek punitive damages for the alleged deprivation of their constitutional rights. Although punitive damages may be available for certain violations of Section 1983 and must be pleaded and proven, a claim for such relief should not be a separately-delineated cause of action. Whether plaintiffs will be permitted to seek punitive damages at trial will be determined at a later

stage.[6] Likewise, although 42 U.S.C. § 1988 permits a prevailing party to obtain attorneys' fees, a claim for such relief should not be a separately-delineated cause of action.

VI. State Law Claims

Having dismissed plaintiffs' federal claims, the Court declines to exercise supplemental jurisdiction over the remaining State law claims pursuant to 28 U.S.C. § 1367(c)(3).[7]

CONCLUSION

For the foregoing reasons, the Court GRANTS defendants' motions to dismiss.

Plaintiffs' substantive due process claim (Count One) is dismissed without prejudice as to defendants Winter, Slingerland, and Insardi, and plaintiff is granted leave to file an amended complaint as to that claim and as to these three defendants by no later than March 16, 2012. This claim is dismissed with prejudice as to defendant Derrico.

Plaintiffs' Section 1983 conspiracy claim (Count Two) is dismissed with prejudice.

Plaintiffs' First Amendment retaliation claim (Count Three) is dismissed with prejudice.

The Clerk is instructed to terminate the pending motions. (Docs. #11, #15, #22).

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[6] Punitive damages are only available against individual defendants, not against local governments. City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

[7] Defendants Tiekert and Morelli also move for sanctions pursuant to Fed. R. Civ. P. 11(c)(3), (4), and 42 U.S.C. § 1988. In an exercise of the Court's discretion, that motion is denied.

Counsel for the remaining parties are directed to appear for a case management conference on March 20, 2012, at 10:00 a.m.

Dated: February 28, 2012
White Plains, NY

SO ORDERED:

Vincent L. Briccetti
United States District Judge