UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO: 17-cv-81254-MIDDLEBROOKS

PBT REAL ESTATE, LLC, a Florida limited liability company,

Plaintiff,

v.

TOWN OF PALM BEACH, a Florida municipal corporation, DOROTHY JACKS, as Property Appraiser of Palm Beach County, Florida and ANNE M. GANNON, as Tax Collector of Palm Beach County, Florida,

Defendants.
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ORDER

THIS CAUSE comes before the Court upon Defendant Town of Palm Beach's ("Defendant" or "Town") Motion for Attorneys' Fees and Non-Taxable Expenses and Costs, filed August 17, 2018. (DE 58). Plaintiff PBT Real Estate, LLC ("Plaintiff") filed a Response on August 31, 2018 (DE 60), to which Defendant replied on September 7, 2018 (DE 61). After careful review of Defendant's Motion and the underlying record, it is hereby granted.

BACKGROUND

Plaintiff is a limited liability company that owns real property in Palm Beach, Florida. Plaintiff alleged that in 2014 and 2015, the Town held a series of public meetings after which it determined that it was in the best interest of all Palm Beach property owners, residents and visitors to bury all overhead utility lines located within the island of Palm Beach. (DE 35 ¶ 24). In 2015, the Town proposed levying non-ad valorem special assessments totaling $90,000,000.00 against Town of Palm Beach properties to pay for the town-wide undergrounding project (the "Special

Assessments"). (DE 35 ¶ 25). On June 21, 2017, the Town notified Plaintiff that its share of the non-ad valorem Special Assessment is $15,397.50, payable over a period of 30 years. (DE 35 ¶ 39).

Plaintiff alleged that the utilities for its property were serviced by a submerged cable that runs under the Intracoastal Waterway and that the Property was not serviced by or connected to above ground utility lines on the island of Palm Beach. (DE 35 ¶¶ 46–48). According to the Third Amended Complaint, the Town imposed a penalty on Plaintiff without conferring proper benefits. (DE 35 ¶ 57). Plaintiff alleged that the Town did not impose this special assessment on similarly situated individuals who had also previously paid to "underground" their utility lines. (DE 35 ¶¶ 54–59). Plaintiff alleged violations of substantive due process (Count I), equal protection (Count II), and Florida law (Count III).

Plaintiff amended the Complaint prior to removal, and on Defendants' motions, this Court dismissed the First Amended Complaint on February 22, 2018 (DE 17) and the Second Amended Complaint on May 10, 2018 (DE 33). Plaintiff filed the Third Amended Complaint on May 18, 2018 (DE 35), and on June 19, 2018, the Court issued an Order granting Defendant's Motion for Summary Judgment and granting in part Defendant's Motion to Dismiss. (DE 49). As a result of that Order, Final Judgment was entered against Plaintiff and the case was closed. (DE 50; DE 51). The Court subsequently denied Plaintiff's Motion to Reconsider. (DE 59). Plaintiff filed a Notice of Appeal on September 13, 2018. (DE 62). Pursuant to 42 U.S.C. § 1988 and S.D. Fla L.R. 7.3(a), Defendants seek $121,377.50 in attorneys' fees and $4,676.47 in non-taxable expenses and costs.[1] (DE 58 at 6).

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[1] Defendant does not appear to seek costs incurred in defending Count III. First introduced in the Second Amended Complaint, Count III was a claim for "Violation of Florida Constitution and Florida State Law." (DE 20 at 14). I twice dismissed Count III for failure to specify the statutory or constitutional provision underlying the claim. (DE 33; DE 59).

LEGAL STANDARD

A district court may in its discretion award attorneys' fees to a prevailing defendant in an action under 42 U.S.C. § 1983 upon a finding that the plaintiff's lawsuit "was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (quoting *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 421 (1978)). With respect to the award of such fees, the Supreme Court has instructed that:

> In applying these criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

Christiansburg Garment Co., 434 U.S. at 421–22. In determining whether a suit is frivolous, "a district court must focus on the question whether the case is so lacking in arguable merit as to be groundless or without foundation rather than whether the claim was ultimately successful." *Sullivan v. Sch. Bd. of Pinellas Cty.*, 773 F.2d 1182, 1189 (11th Cir. 1985) (quoting *Jones v. Texas Tech University*, 656 F.2d 1137, 1145 (5th Cir. 1981)). Determinations are to be made on a case-by-case basis and factors considered important in such a determination include "(1) whether the plaintiff established a prima facie case; (2) whether the defendant offered to settle; and (3) whether the trial court dismissed the case prior to trial or held a full-blown trial on the merits." *Id.* "In cases where the plaintiffs introduced evidence sufficient to support their claims, findings of frivolity typically do not stand." *Id. See also O'Neal v. DeKalb Cty., Ga.*, 850 F.2d 653, 658 (11th Cir.

1988) ("Simply because the district court granted the defendants' motion for summary judgment does not mean that the plaintiffs' action was frivolous.").

ANALYSIS

1. Count I

Count I alleged a violation of substantive due process under the Fifth Amendment, applied to the states through the Fourteenth Amendment. "Where a person's state-created rights are infringed by a 'legislative act,' the substantive component of the Due Process Clause generally protects that person from arbitrary and irrational governmental action." *Kentner v. City of Sanibel*, 750 F.3d 1274, 1279–80 (11th Cir. 2014). Substantive due process challenges that do not implicate fundamental rights are reviewed under the highly deferential "rational basis" standard. *See, e.g.*, *TRM, Inc. v. United States*, 52 F.3d 941, 945 (11th Cir. 1995). In order to survive this "minimal scrutiny," the challenged provision need only be rationally related to a legitimate government purpose. *Schwarz v. Kogan*, 132 F.3d 1387, 1391 (11th Cir. 1998) (citing *TRM, Inc.*, 52 F.3d at 945).

Plaintiff argued that the Special Assessment was improper under Florida law because Plaintiff did not receive a direct benefit from the assessment and that "the generalized benefits conferred to the community as a whole do not support imposing the Special Assessment." (DE 43 at 11). These arguments wholly misconceived the applicable standard. As I wrote in the Order on Motion for Summary Judgment and Motion to Dismiss:

> The question, however, is not whether the Town was correct in finding that Plaintiff receives some measure of benefit from the project. Instead, the question is whether the Resolutions "are rationally related to a legitimate government purpose." *Schwarz v. Kogan*, 132 F.3d 1387, 1390–91 (11th Cir. 1998) (citing *TRM, Inc. v. United States*, 52 F.3d 941, 945 (11th Cir. 1995)). Here, there is no question that the Town had a legitimate interest in burying its overhead utilities and dividing the costs of the Project among benefitted parcels.

(DE 51 at 6).

Plaintiff noted in its opposition brief that "there is no dispute that the Town examined enhanced safety, reliability, and aesthetics it intended to confer on properties in the Town under the Town-Wide Undergrounding Project, using a method developed by the Town to allocate the cost to properties." (DE 43 at 5). Considering the applicability of the rational basis standard and Plaintiff's outright concession of the existence of a rational basis, I have no choice but to find Claim I unreasonable and without basis. It is no excuse, in this case, that Plaintiff may have misconceived the appropriate standard.[2]

2. Count II

Count II of the First Amended Complaint, the Second Amended Complaint, and the Third Amended Complaint alleged a violation of the Fifth Amendment's Equal Protection Clause, as applied to the states through the Fourteenth Amendment. (DE 1-3 at 16; DE 20 at 13; DE 35 at 13). The Court dismissed Count II without prejudice when it ruled on Defendant's first Motion to Dismiss. (DE 3). In that Order, I wrote that such a "class of one" Equal Protection argument required Plaintiff to show that "(1) that it was treated differently from other similarly situated individuals, and (2) that [the Town] unequally applied a facially neutral ordinance for the purpose of discriminating against Plaintiff[]." (DE 17 at 5–6) (citing *Young Apartments, Inc. v. Town of Jupiter, FL*, 529 F.3d 1027, 1045 (11th Cir. 2008)). This circuit has tightened the application of Rule 8 with respect to 1983 claims, however, such that courts evaluating class-of-one claims are "obliged to apply the similarly situated requirement with rigor." *Griffin Indus., Inc. v. Irvin*, 496

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[2] Plaintiff first brought a substantive due process claim in the Second Amended Complaint. (DE 20). This Court dismissed Claim I as stated in the Second Amended Complaint because Plaintiff did not allege sufficient facts for the Court to determine whether the conduct complained of qualified for the legislative exception to the general rule that there is no substantive due process protection for state-created property rights. (DE 33 at 5) (citing *Kentner v. City of Sanibel*, 750 F.3d 1274, 1279 (11th Cir. 2014)). Thorough review of the analysis in the Order on Motion to Dismiss would have led diligent attorneys to the applicable standard. *See Kentner*, 750 F.3d at 1280 ("Substantive due process challenges that do not implicate fundamental rights are reviewed under the 'rational basis' standard.") (quoting *Fresenius Med. Care Holdings, Inc. v. Tucker*, 704 F.3d 935, 945 (11th Cir. 2013)).

F.3d 1189, 1207 (11th Cir. 2007). In dismissing the First Amended Complaint without prejudice, I wrote that Plaintiff failed to allege that the comparators were "similarly situated 'in light of all the factors that would be relevant to an objectively reasonable governmental decisionmaker.'" *Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269, 1274 (11th Cir. 2008) (citing *Griffin Indus., Inc.* at 1207).

Plaintiff filed a Second Amended Complaint (DE 20), Defendant filed another Motion to Dismiss (DE 21), and for a second time I dismissed Count II:

> I previously dismissed Plaintiff's equal protection claim for failure to allege that the Comparators "are similarly situated 'in light of all the factors that would be relevant to an objectively reasonable governmental decisionmaker.'" *Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269, 1274 (11th Cir, 2008) (quoting *Griffin Indus., Inc.* at 1207). Plaintiff did not remedy this deficiency in the Second Amended Complaint. Plaintiff alleges only that the Comparators, like Plaintiff, have either already undergrounded their utility lines or are in the process of doing so, and therefore receive no benefit from the Undergrounding Project. Plaintiff submits no allegations to show that this single factor is the only factor that "would be relevant to an objectively reasonable governmental decisionmaker." Applying the "'similarly situated' requirement with rigor," I find that Plaintiff again fails to allege facts, which if proven, would show that the comparators "are similarly situated 'in light of all the factors that would be relevant to an objectively reasonable governmental decisionmaker.'"

(DE 33 at 6). The Second Amended Complaint was dismissed in its entirety. (*Id.* at 7).

Count II was again included in the Third Amended Complaint as an equal protection claim. The Third Amended Complaint states that:

> "The only relevant facts that establish PBT and Palm Beach Towers are similarly situated to Similarly Situated Properties are (a) the Town-Wide Underground Project does not underground the utility lines for the properties; and (b) the Town-Wide Underground Project does not confer a special benefit on the properties that have already undergrounded utility lines."

(DE 35 ¶ 79). Thus Claim II, as amended, appears no more able to state a claim for relief than Claim II as written (and previously dismissed) in the Second Amended Complaint. In my Order on Motion for Summary Judgment and Motion to Dismiss, I granted summary judgment for Defendant on Count II because Plaintiff failed to come forward with evidence to show that it was similarly situated to the comparators in light of all the factors that would be relevant to an objectively

reasonable government decisionmaker, noting that the Town did in fact consider whether the comparator parcels were already subject to prior special assessments and that it appeared reasonable to do so based on the record.

CONCLUSION

With this ruling, I have not engaged in improper post hoc reasoning regarding the relative merit of Plaintiff's § 1983 claims. I need not determine whether the claims were frivolous at the outset of this litigation, but I am convinced that the claims were frivolous by the time the Third Amended Complaint was filed. This is because the function of a motion to dismiss is, at least in part, to notify plaintiffs of the legal deficiencies in their claims. Failure to diligently address the shortcomings identified in 12(b) rulings results in unnecessary costs and delay to opposing counsel and harms judicial economy. I dismissed Count I once before granting summary judgment and Count II twice. It is not engaging in post hoc reasoning to find Counts I and II, as written in the Third Amended Complaint, were "frivolous, unreasonable, [and] without foundation." Accordingly, it is

ORDERED AND ADJUDGED that

(1) Defendant's Motion for Attorney's fees and Non-Taxable Expenses and Costs (DE 58) is **GRANTED**.

(2) Defendant Town of Palm Beach is **AWARDED** $121,377.50 in attorneys' fees and $4,676.47 in non-taxable expenses and costs.

SIGNED in Chambers in West Palm Beach, Florida on this 5 day of March, 2019.

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record