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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ANN MARIE BORGES and CHRIS GURR, individually and doing business as GOOSE HEAD VALLEY FARMS,

Plaintiffs,

v.

COUNTY OF MENDOCINO, SUE ANZILOTTI and Does 1 – 25 inclusive,

Defendants.

Case No. 3:20-cv-04537-SI

PLAINTIFFS' OPPOSITION TO DEFENDANT SUE ANZILOTTI'S MOTION TO DISMISS

Date: September 25, 2020
Time: 9:00 a.m.
Ctrm: 1, 17th Floor, 450 Golden Gate Avenue, San Francisco, CA
Judge: The Honorable Susan Illston

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INTRODUCTION

Sue Anzilotti (Anzilotti) has been sued as a private actor who conspired with state actors to deprive the Plaintiffs of a permit to cultivate medical cannabis. In her motion to dismiss (Dkt. 12) she raises essentially three arguments:

(1) Anzilotti joins in the motion to dismiss filed by the County of Mendocino on the basis that plaintiffs have no constitutional or other federal rights to cultivate marijuana because it is a controlled substance under federal law;

(2) Plaintiffs have not satisfied the pleading requirements for a conspiracy claim; and

(3) The conclusory allegations do not cross the "plausibility threshold" articulated in *Twombly*, 550 U.S. 544 (2007).

This motion should be denied because (1) the Plaintiffs have adequately alleged constitutional violations as demonstrated in their opposition to the County of Mendocino's motion to dismiss, (2) the Plaintiffs have satisfied the pleading requirements of a Section 1983 conspiracy claim and (3) the allegations are plausible because most of the facts alleged are not in genuine dispute and well documented. In addition, Anzilotti asks this court to draw inferences in her favor while considering evidence that is outside the four corners of the complaint.

FACTS ALLEGED

In this opposition memorandum the Plaintiffs will attempt to avoid repeating the underlying material facts alleged in support of their claims against the County of Mendocino. Rather, in this memorandum the Plaintiffs will focus on the facts alleged in the complaint that collectively support the conspiracy claims, i.e., the Second and Fourth Causes of Action. Dkt. 1, pp. 10-11 of 87.

Defendant Sue Anzilotti is sued in her individual capacity as a private actor who conspired with state actors. At all times mentioned herein she was a neighbor of the Plaintiffs

residing at 1551 Boonville Road, Ukiah, California. Defendant Anzilotti cooperated and conspired with County officials and County employees, acting under color of state law, to deprive the Plaintiffs of certain constitutional rights. (Complaint, Dkt. 1, ¶ 5)

Beginning on or about June 20, 2017 Defendant Sue Anzilotti contacted Steve White of the California Department of Fish and Wildlife (CDFW) on behalf of "concerned homeowners" who lived adjacent to Plaintiffs' property. She made false allegations that the water source for Plaintiffs' approved cultivation site was not approved for use in commercial cultivation operations. (Id., at ¶ 14)

On August 10, 2017 at approximately 10:30 a.m. a convoy of CDFW vehicles arrived at Plaintiffs' property and agents with guns pointed immediately placed the Plaintiffs in handcuffs. Plaintiffs informed Steve White, the CDFW team leader, they had an application receipt from the County and were in full compliance with all County regulations. They also informed him that they were awaiting a report from Alpha Labs for tests of the creek water and the well water. The CDFW team claimed they believed the water was being diverted from the creek and proceeded to cutdown and eradicate the plants, i.e., 100 plants growing indoors under a hoop and 171 plants growing outdoors in an approved location of 10,000 square feet. The garden was within County guidelines and took up approximately one quarter acre on the 11 acres farm. (Id., at ¶ 18)

On November 22, 2017, Plaintiff Chris Gurr made a formal complaint against Sue Anzilotti to the Enforcement Division of the Fair Political Practices Commission. See Exhibit E attached. The allegations centered on Sue Anzilotti's use of her position as an unsworn administrator with the Sheriff's Office to obtain access of private information, including illegal background checks, and misuse of her government position to conduct personal business to

influence decisions by County officials and employees that would personally benefit her. (Id., at ¶ 23; Ex. E, at pp. 79-82 of 87)

Defendant Sue Anzilotti was politically connected to at least two members of the Mendocino County Board of Supervisors, John McCowen and Carre Brown. When Sue Anzilotti began to complain publicly against the Plaintiffs to various state and local agencies she also complained privately to many officials - including John McCowen and Carre Brown. (Id., at ¶ 29)

Co-conspirator John McCowen played a leading and influential role among a majority of the Board of Supervisors. With that apparent authority he formed a special relationship with Deputy County Counsel Matthew Kiedrowski, another co-conspirator. Matthew Kiedrowski was assigned by County Counsel Kit Elliot to oversee the Cannabis Program that was under the jurisdiction of the Commissioner of the Department of Agriculture. Diane Curry was the Interim Commissioner from as early as 2016 until she retired in March 2018. (Id., at ¶ 30)

Sometime after the Plaintiffs submitted their application in May 2017 Commissioner Curry was informed by Matthew Kiedrowski that John McCowen would never allow the Plaintiffs' project to be approved. He also mentioned a loophole John McCowen found in the ordinance to prevent (B)(3) applicants, such as the Plaintiffs, from obtaining permits if their prior cultivation experience was "coastal." (Id., at ¶ 31)

After the Plaintiffs amended their application to include an inland site in Willits to satisfy the prior cultivation requirement, Commissioner Curry decided to issue the permit and informed the Plaintiffs of this decision. However, co-conspirator Matthew Kiedrowski intervened and prevented the temporary permit from being delivered. He created another hurdle. (Id., at ¶ 32)

The Plaintiffs hired an attorney and the requested "Agreement Not to Resume Cannabis Cultivation" was provided to Matthew Kiedrowski. See Exhibit D attached. Nevertheless, the

approved temporary permit was now being held hostage, under color of state law, by Matthew Kiedrowski in furtherance of the conspiracy between Sue Anzilotti, John McCowen and Matthew Kiedrowski. In addition, co-conspirators McCowen and Kiedrowski were acting as de facto final decision makers for the County of Mendocino. (Id., at ¶ 33)

In March 2018, Diane Curry retired from her position as Interim Commissioner of the Department of Agriculture. This is not the only case where members of the Board of Supervisors attempted to influence her through Deputy County Counsel Matthew Kiedrowski. (Id., at 34)

Diane Curry was replaced by Harinder Grewal. Commissioner Grewal signed a letter prepared by Matthew Kiedrowski dated July 9, 2018. The letter was sent by the County of Mendocino on or about that date officially notifying the Plaintiffs their application was denied and the reason for the denial. See Exhibit G attached. The manufactured reason for the denial is both false and pretextual. (Id., at ¶ 35)

Defendant Sue Anzilotti, a private actor, conspired with John McCowen, a state actor, to achieve a common goal, i.e., prevent the Plaintiffs from becoming licensed by the County of Mendocino to grow medical cannabis at the farm they had recently purchased. The 11 acres farm is zoned AG40 for agriculture and was a near perfect site for cannabis cultivation in rural Mendocino County. (Complaint, ¶ 44)

Supervisor John McCowen, as Chairman of the Board of Supervisors, then enlisted Deputy County Counsel Matthew Kiedrowski to join the conspiracy. In furtherance of the conspiracy Matthew Kiedrowski obstructed and prevented the Plaintiffs from receiving the temporary permit approved by Commissioner Curry in September 2017. (Complaint, ¶ 45)

After Commissioner Curry retired in March 2018, and in furtherance of the conspiracy, Matthew Kiedrowski influenced Commissioner Grewal to sign a letter dated July 9, 2018 notifying the Plaintiffs that their application was denied. The reason given for the denial is transparently false and fraudulent. (Complaint ¶ 46)

ARGUMENT

A. The Applicable Law.

A dismissal motion should be denied if the subject complaint contains factual allegations adequate to give defendants fair notice of the pending claims, and, enables them to defend themselves if the complaint's allegations, taken as true, plausibly suggest entitlement to relief. *Starr v. Baca*, 652 F.3d 1202, 1216-1217 (9th Cir. 2011), rehearing en banc denied, 659 F.3d 850 (9th Cir. 2011). When ruling on a motion to dismiss, the court must accept as true all of the factual allegations contained in the complaint. *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007). The court must draw inferences in favor of the plaintiff. The complaint should be construed favorably to the pleader. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Walleri v. Federal Home Loan Bank of Seattle*, 83 F.3d 1575, 1580 (9th Cir. 1996).

Dismissal for failure to state a claim is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984). The issue is whether the plaintiff is entitled to offer evidence to support the claims, not whether based on a complaint's allegations he will prevail as a matter of law. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974) (no quotations added). The Ninth Circuit has "repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts."

Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000).

B. The Federal Law Regarding Conspiracy.

The law is clearly established that a private party can be liable under Section 1983 for conspiring with a state actor to cause a constitutional violation. *Adickes v S.H. Kress & Co*., 398 U.S. 144 (1970). To be liable, each participant in the conspiracy need not know the exact details of the plan, but must at least share the common objective of the conspiracy. *United Steelworkers of Am. v. Phelps Dodge Corp*., 865 F.2d 1539, 1541 (9th Cir. 1989) (en banc); *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999). Evidence of agreement may be circumstantial rather than direct. *Gilbrook*, 177 F.3d at 856-57.

The agreement need not be explicit; it is sufficient if the conspirators knew or had reason to know the scope of the conspiracy and that their own benefits depended on the success of the venture. *United States v. Montgomery*, 384 F.3d 1050, 1062 (9th Cir. 2000). *Lacey v. Maricopa County* reaffirmed *Gilbrook v. City of Westminster*, 177 F.3d 839, 856-57 (9th Cir. 1999): "To be liable, each participant in the conspiracy need not know the exact details of the plan, but must at least share the common objective of the conspiracy. A defendant's knowledge of and participation in a conspiracy may be inferred from circumstantial evidence and from evidence of the defendant's actions." *Lacey*, *supra*, at 935. After a conspiracy is established, proof of the defendant's connection to the conspiracy must be shown . . . but the connection can be slight. *United States v. Johnson*, 297 F.3d 845, 868 (9th Cir. 2002).

Withdrawal terminates the defendant's liability for post-withdrawal acts of his or co-conspirators, but he remains guilty of conspiracy. *Smith v. United States,* 568 U.S. 106, 110-111 (2013). To withdraw from a conspiracy a defendant must either disavow the unlawful goal of the conspiracy or affirmatively act to defeat the purpose of the conspiracy. *United States v. Louthian*,

976 F.2d 1237, 1261 (9th Cir. 1992).

The character and effect of a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. *Continental Ore Co. v. Union Carbide,* 370 US 690, 699 (1962).

> We have here a continuous conspiracy. There is no evidence of the affirmative action...which is necessary to establish...withdrawal from it...It is settled that 'an overt act of one partner may be the act of all without any new agreement specifically directed to that act. The criminal intent to do the act is established by the formation of the conspiracy.

*Pinkerton v. United State*s, 328 US 640, 644-647 (1946).

C. Plaintiffs have Sufficiently Alleged a Conspiracy Claim.

Defendant Anzilotti relies primarily on *NCAA v Tarkanian*, 488 U.S. 179 (1988) for the proposition that because she claims her interests were divergent from the County of Mendocino this case can be distinguished from *Adickes v Kress*, 398 U.S. 144 (1970) and *Dennis v Sparks*, 449 U.S. 24 (1980). In making this argument Anzilotti contends that certain allegations were not made with specificity, e.g., (1) Plaintiffs have not alleged that Anzilotti and McCowen actually communicated and agreed on anything; (2) nor is it alleged Anzilotti ever communicated with Deputy County Counsel Kiedrowski; and (3) nor is it alleged that Anzilotti knew the Plaintiffs were entitled to a permit or that Plaintiffs had a constitutional right to the permit.

The allegations in the complaint nullifying the alleged deficiencies are set forth with specificity in paragraphs 44, 45 and 46 of the complaint.

Defendant Sue Anzilotti, a private actor, conspired with John McCowen, a state actor, to achieve a common goal, i.e., prevent the Plaintiffs from becoming licensed by the County of Mendocino to grow medical cannabis at the farm they had recently purchased. The 11 acres farm is zoned AG40 for agriculture and was a near perfect site for cannabis cultivation in rural

Mendocino County. (Complaint, ¶ 44)

Supervisor John McCowen, as Chairman of the Board of Supervisors, then enlisted Deputy County Counsel Matthew Kiedrowski to join the conspiracy. In furtherance of the conspiracy Matthew Kiedrowski obstructed and prevented the Plaintiffs from receiving the temporary permit approved by Commissioner Curry in September 2017. (Complaint, ¶ 45)

After Commissioner Curry retired in March 2018, and in furtherance of the conspiracy, Matthew Kiedrowski influenced Commissioner Grewal to sign a letter dated July 9, 2018 notifying the Plaintiffs that their application was denied. The reason given for the denial is transparently false and fraudulent. (Complaint ¶ 46)

It is not necessary that Anzilotti communicated with Matthew Kiedrowski. Once a conspiracy is formed between Sue Anzilotti and John McCowen to achieve a common goal, the fact that McCowen recruits Keirdowski to act in furtherance of the conspiracy does not protect Anzilotti from the consequences of the acts done by Kierdowski in furtherance of the conspiracy.

Plaintiffs have alleged a pattern of conduct by Anzilotti that falls well outside the scope of petitioning activities. At paragraph 23 of the Complaint the Plaintiffs allege numerous acts identified in a formal complaint made on November 22, 2017 to the Enforcement Division of the Fair Political Practices Commission. See Exhibit E to the Complaint, Dkt. 1, at pp. 79-82 of 87. Coincidentally, these extra-legal activities occurred during the same time period the alleged conspiracy was formed, i.e., August to November 2017.

In addition, to be liable as a co-conspirator it is not required that Anzilotti knew the Plaintiffs were entitled to a permit or that they had constitutional right to the permit. Rather, it is clearly alleged that the "common goal" of the conspiracy was to "prevent the Plaintiffs from becoming licensed by the County of Mendocino to grow medical cannabis at the farm they had

recently purchased." Complaint, Dkt. 1, ¶ 44, p. 10 of 87. It is further alleged that as a result of the conspiracy the Plaintiffs application for a permit was denied. Id., at ¶ 46, p. 10 of 87.

Anzilotti also contends she was participating in petitioning activity protected by the First Amendment while asking the court to draw inferences in her favor. The Plaintiffs recognize that Anzilotti engaged in some petitioning activities. However, the Plaintiffs have identified a number of acts by Anzilotti that fall well outside the scope of activities protected by the First Amendment and the Noerr-Pennington doctrine. (Complaint at ¶ 23; and Exhibit E).

For example, a petitioning activity would be to publicly and transparently contact Commissioner Curry and seek to have the application denied for a legitimate reason. But that is not what happened here. Rather, it is alleged that Commissioner Curry intended to issue the permit (Complaint, ¶¶ 21 and 22) and, in furtherance of the conspiracy, Supervisor McCowen enlisted Deputy County Counsel Matthew Kiedrowski to join the conspiracy. It is further alleged that Kiedrowksi, in furtherance of the conspiracy, prevented the Plaintiffs from receiving the permit approved by Commissioner Curry. (Complaint, ¶¶ 45 and 46).

These allegations, if true, show that the conspiracy was intended to surreptitiously circumvent and illegally assist the petitioning activities available to a person who opposed a neighbor's application for a permit.

D. The Allegations Meet the Twombly Plausibility Threshold.

This argument fails because it completely ignores the exhibits to the complaint, many undisputed facts and paragraphs 44, 45, 46, 53, 54 and 55 of the complaint. The argument also invites the court to adopt certain facts not alleged in the complaint, draw inferences in favor of the County and Anzilotti, and decide issues of motive and intent.

CONCLUSION

For the forgoing reasons, Anzilotti's motion to dismiss should be DENIED.

Dated: August 27, 2020

SCOTT LAW FIRM

By: /s/ John Houston Scott
Attorney for Plaintiffs