IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-01301-CMA-STV

ALISON BROWN,

Plaintiff,

v.

CHAFFEE COUNTY,
CHAFFEE COUNTY BOARD OF REVIEW,
JON ROORDA, PLANNING MANAGER, CHAFFEE COUNTY PLANNING AND ZONING,
DAN SWALLOW, DIRECTOR OF DEVELOPMENT SERVICES, CHAFFEE COUNTY, and
CHAFFEE COUNTY BOARD OF COUNTY COMMISSIONERS,

Defendants.

REPLY IN SUPPORT OF MOTION TO DISMISS

Defendants, by undersigned counsel, reply to plaintiff's response to their motion to dismiss the amended complaint.

A. Well-pleaded complaint need only allege facts that establish plausible claim, but the facts of plaintiff's complaint, even as amended, fail to support plausible claims under either of plaintiff's theories.

Plaintiff's response asserts two theories on which she believes she is entitled to relief: (1) deprivation of a vested property right without due process and (2) a class-of-one equal protection violation. She opposes dismissal based on the argument that her amended complaint alleges facts sufficient to satisfy the *Twombly-Iqbal* pleading standard. Resp. to Mot. to Dismiss ¶¶ 5-6 (Doc. 34), citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). While it is accurate that a well-pleaded complaint need only allege facts, which, taken as true, state a plausible claim for relief (*Twombly*, 550 U.S. at 555-57; *Iqbal*, 556 U.S. at

678), the facts alleged in plaintiff's amended complaint fail to support a facially plausible claim entitling her to relief on either theory.

B. Plaintiff fails to set forth a plausible claim of deprivation of a vested property right without due process.

To state a claim for the deprivation of property without due process, plaintiff must allege facts sufficient to plausibly suggest that (1) she was deprived of a protected property interest and (2) the deprivation was arbitrary. *See Jordan-Arapahoe, LLP*, 633 F.3d at 1025 (citing *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir.2000)). Under Colorado law, "a legitimate claim of entitlement to certain circumscribed benefits" may constitute a protected property interest. *Eason v. Bd. Of Cnty. Comm'rs of Cnty. of Boulder*, 70 P.3d 600, 604 (Colo. App. 2003) (*Eason II*). Plaintiff relies on *Eason II* to support her contention that she has a vested property right in the use of her land to operate an outfitting facility. But *Eason II* is factually distinct from the case at hand and does not suggest, as plaintiff claims, that a protected property right vested by virtue of the issuance of a building permit as also creating a vested property right in the use of land for a specialized purpose without complying with other land use regulations, here limited impact review.

In *Eason II*, plaintiff Eason placed semitrailers on his land in reliance on a letter from the county stating that the semitrailers were compliant with the zoning code. 70 P.3d at 603. After obtaining a building permit and operating a storage business with the semitrailers, the county informed Eason it was revoking his building permit because the zoning resolution had changed. *Id*. The court held that Eason had a protected property interest in the zoning classification that became vested when he took substantial action in reliance on representations by the government. *Id* at 605-606.

Here, unlike *Eason II*, there was no change to the zoning ordinances that made a previously permitted use a zoning violation. Plaintiff also mistakenly concludes that her right in the building permit also granted her a vested property right in the use of her land for a particular purpose. She contends that the building permit and certificate of zoning compliance approved the land use, thereby creating a vested property right. Resp. ¶ 13. A building permit does not equate to a use permit; plaintiff was only affirmatively permitted to build a residential structure. Plaintiff thus cannot argue she detrimentally relied on representations by the county regarding her use of the property, as the county only represented to plaintiff that her proposed construction was compliant with zoning ordinances by issuing a building permit, the form for which includes plaintiff's certificate of zoning compliance. *See* Am. Compl. ¶¶ 20-21. The building permit was not a representation by the county that no limited impact review was required to operate the outfitting facility. The fact that the outfitting facility was acknowledged as being within the zoning regulations did not eliminate the requirement that plaintiff apply for a limited impact review. Even as pled by plaintiff, Mr. Roorda's communications with plaintiff made clear that using the property as an outfitting facility would require a limited impact review. *See* Am. Compl. ¶ 19.

Plaintiff attempts to distinguish *Jordan-Arapahoe, LLP v. Board of County Com'rs of County of Arapahoe* to suggest that the issuance of a building permit creates a vested property interest in using her land for a particular purpose without the need to comply with the limited impact review requirement. 633 F.3d 1022 (10th Cir. 2011). In *Jordan-Arapahoe*, the Tenth Circuit held that reliance on a zoning ordinance alone was insufficient to create a vested property interest. *Id*. at 1032. But *Jordan-Arapahoe* only recognized that "property rights vest in a

particular land use after a building permit has been issued and the landowner acts in reliance on it," not that there is also a vested property right in avoiding compliance with other land use regulations. *Id*. at 1029. Plaintiff thus fails to adequately state a claim for relief under a theory of deprivation of a vested property right without due process.

C. Plaintiff does not set forth a plausible claim for relief under a class-of-one equal protection violation.

In order to adequately state a claim for relief under a theory of a class-of-one equal protection violation, plaintiff must allege that (1) she was treated differently from other property owners who were "similarly situated in every material respect" and (2) that "this difference in treatment was without rational basis." *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d at 1216 (10th Cir. 2011). Plaintiff asserts that in order to sufficiently plead a class-of-one equal protection claim, she "is only required to allege the identity or characteristics of other similarly situated property owners and how those property owners were treated differently." Resp. ¶ 20; *see Kansas Penn Gaming* at 1219–20. But in *Kansas Penn Gaming*, the Tenth Circuit held that the district court was correct in dismissing the complaint because the plaintiffs "failed to allege facts suggesting that other property owners were similarly situated in all material respects." *Id*. at 1220.

Here, Brown has also failed to allege facts indicating that the allegedly similarly situated property owners are similarly situated in all material respects. Each of the properties she alleges as being "similarly situated" differs substantially in use from her use of foxhound hunting expeditions. *See* Mot. to Dismiss Am. Compl. at 14-17 (Doc. 30).

Plaintiff does not dispute that there are distinct differences between her use of her property as an outfitting facility and other guiding services that also fall within the definition of

an outfitting facility. Instead, she argues that because of the broad nature of the definition, the practical differences should be overlooked and all other outfitting facilities should be considered similarly situated property owners. Resp. ¶¶ 17-18.

Plaintiff still fails to allege facts necessary to satisfy the second element of the class-of-one equal protection claim; that there was no rational basis for the difference in treatment. Even if all other outfitting facilities were considered to be similarly situated merely because they fall under the same broad definition, the practical differences between conducting foxhound hunting expeditions and providing other guiding services would give the county a rational basis for treating plaintiff differently. Plaintiff accordingly falls short of the pleading standard articulated in *Kansas Penn Gaming* and thus fails to set forth a plausible claim for relief under a theory of a class-of-one equal protection violation.

D. Plaintiff's arguments fail to rebut that in this case, the state court permanent injunction order precludes Brown's claims.

Plaintiff opens her opposition to preclusion by citing *Jones v. Bock*, 549 U.S. 199, 215 (2007); *Fernandez v. Clean House, LLC*, 883 F.3d 1296, 1298-99 (10th Cir. 2018); and *Ghailani v. Sessions*, 859 F.3d 1295, 1305–06 (10th Cir. 2017). These cases reversed dismissals where the plaintiffs were not required to plead facts in anticipation of affirmative defenses.

Jones v. Bock was a case under the Prison Litigation Reform Act (PLRA) concerning the proper role of judicial screening. While the PLRA requires inmates to exhaust administrative remedies, the Court instructed that failure to exhaust is better viewed as an affirmative defense rather than a pleading requirement in order to avoid dismissal on judicial screening. Reversing dismissals that had been ordered on judicial screening, the Court held that the Sixth Circuit's procedural rules exceeded the scope of the proper judicial role under the PLRA.

In *Fernandez v. Clean House*, an action under the Fair Labor Standards Act (FLSA), the Tenth Circuit reversed the district court's order that had dismissed the plaintiffs' complaint. It held that the statute of limitations on an FLSA claim of willful violation is an affirmative defense which the plaintiffs did not need to anticipate in their complaint fact allegations.

In *Ghailani v. Sessions*, the plaintiff prisoner was forbidden from participating in group prayer with other inmates due to prior terrorist activity. The Tenth Circuit reversed dismissal because Special Administrative Measures (SAMs) expired during the appeal, making SAMs unavailable to support dismissal, and furtherance of a compelling governmental interest was otherwise an affirmative defense that the government was required to demonstrate.

Distinct from *Jones, Fernandez,* and *Ghailani,* this is not a motion where the defense attacks a failure to plead the facts that would disprove applicability of an affirmative defense. Rather, the defense position is that plaintiff's amended complaint allegations demonstrate preclusion, as they refer to the state court order and thus, the order is properly considered.

Plaintiff argues against issue identity on the grounds that the state court permanent injunction order was limited to outfitting and did not address her claim predicated on the county's requirement that she also undergo limited impact review to operate a kennel. The permanent injunction order contains a reference to the fact that, at the time of the injunction proceeding, plaintiff was then in compliance with the county's kennel regulation. "The Court will note that **Dr. Brown's compliance with the County's kennel regulations** has nothing to do with whether or not she is in compliance with the County's regulation surrounding outfitting facilities." *See* Doc. 30-1, p. 6 [Ex. A, Mot. to Dismiss Am. Compl.].

Nonetheless, the language of the state court permanent injunction embraces plaintiff's contention that she had a vested property right to operate a kennel without going through limited

impact review. The order enjoined plaintiff from "using any improved structures or facilities at 11600 Antelope Road to provide service, housing or safekeeping to any animal or equipment that is used in conjunction with guiding services, specifically such guiding services that involve Dr. Brown's riding out or hunting with foxhounds on public lands with any other individuals who are not effecting substantial control over the foxhounds." *See* Doc. 30-1, p. 7 [Ex. A, Mot. to Dismiss Am. Compl.]. The language referring to "structures or facilities" and "housing or safekeeping of any animal," precludes plaintiff's attempt to assert that she may still proceed with a claim alleging deprivation of due process in being required to undergo limited impact review to operate a kennel. Plaintiff's amended complaint makes clear that the operation of a kennel has always been part of her contention that the permit to build a residential structure gave her vested rights to the non-residential uses in contention.

In arguing that state court magistrates are prohibited from determining constitutional issues, plaintiff cites "C.R.M. 5(f)," but omits mention that she consented to magistrate jurisdiction, and further, that this rule allows parties to raise constitutional issues for the first time on a petition to review with a district court judge. As noted by Mag. Hunter, "**This Order was issued with the consent of the parties** and any appeal must be taken pursuant to C.R.M. Rule 7(b)." *See* Doc. 30-1, p. 7 (Ex. A, Mot. to Dismiss Am. Compl.) (emphasis added). Even having consented to magistrate jurisdiction, plaintiff was not precluded from raising a constitutional claim on a petition to review the magistrate's order. Colo. R. Mag. 5(f) provides:

> No magistrate shall have the power to decide whether a state constitutional provision, statute, municipal charter provision, or ordinance is constitutional either on its face or as applied. **Questions pertaining to the constitutionality of a state constitutional provision, statute, municipal charter provision, or ordinance may, however, be raised for the first time on review of the magistrate's order or judgment.**

(Emphasis added.)

Finally, contrary to plaintiff's argument that her situation "substantially aligns" with the plaintiff in *Eason I* (Resp. ¶ 27), *Eason* does not equate to Brown's situation. A fundamental difference between *Eason* on the one hand, and Brown on the other, is that the Boulder zoning ordinance provided Eason with his use by right, to wit, a storage facility, and in 1988, Boulder's land use department specifically approved Eason's proposal "to operate a self-storage business using semitrailers." As detailed in *Eason II*:

> In 1988, the County's land use department approved Eason's proposal to operate a self-storage business using semitrailers on property located on North Broadway Street. The department's director sent Eason a letter (1988 letter) stating that the use was permitted under the zoning code and that the semitrailers were not "structures" and therefore were exempted from the application of the Uniform Building Code (UBC).

Eason v. Board of County Com'rs of County of Boulder, 70 P.3d 600, 603 (Colo. App. 2003) (*Eason II*).

In contrast, Chaffee County does not provide a use by right as an outfitting facility or a kennel (more than seven dogs, more than six months old). Nor does a building permit to construct a house constitute a right to avoid the zoning ordinances concerning outfitting and kennels.

Second, the two proceedings at issue had opposite outcomes. Eason prevailed in his 106(a)(4) action and complaint for damages against the county for violation of due process under 42 U.S.C. § 1983. In Brown, by comparison, it was the county that prevailed against Brown, resulting in the state court injunction order.

E. Plaintiff's response fails to support her claims against defendants other than Chaffee County through its Board of County Commissioners.

Attempting to oppose dismissal of defendants other than the county through its board of county commissioners, plaintiff cites *Wigger v. McKee*, 809 P.2d 999, 1003–1004 (Colo. App. 1990) and *Benes v. Jefferson Cnty. Bd. of Adjustment*, 537 P.2d 753, 753–54 (Colo. App. 1975) Pltf's Resp. ¶ 30. Neither *Wigger* nor *Benes* support plaintiff's ability to make claims against non-BOCC defendants.

In *Wigger,* the Colorado Court of Appeals affirmed summary judgment against a husband and wife who sought damages based on the husband's alleged malicious prosecution for child sexual assault. Theories of recovery consisted of 42 U.S.C. § 1983, alleging deprivation of a constitutional right to be free from prosecution absent probable cause, as well as state law claims of negligence, malicious prosecution, defamation, and outrageous conduct.

As a threshold issue, *Wigger* first analyzed whether the Supreme Court's then recent decision in *Will v. Michigan Department of State Police,* 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989) required dismissal of the claims against government defendants due to Eleventh Amendment immunity. Finding that the county department of social services was indeed an arm of the state, the court in *Wigger* held that Eleventh Amendment immunity required dismissal of the county department and its director. *Wigger,* 809 P.2d at 1002-1004.

Eleventh Amendment immunity did not apply to the other defendants, however. *Id.* at 1002. "In Colorado, a county is defined as 'a body corporate and politic' and has the power to sue and be sued, to enter into contracts, and to levy certain taxes. [Citations omitted.] Therefore, it is not the alter ego of the state for Eleventh Amendment purposes and is a "person" under 42 U.S.C. § 1983." *Wigger,* 809 P.2d at 1003.

Turning to the question of whether Eleventh Amendment immunity required that the sheriff be dismissed, the court in *Wigger* noted that, as distinct from social services departments, sheriffs are separately elected officials who are not "dependent on the state for guidance in [conducting their] affairs [or} funding in case of liability." Further, sheriffs have "many independent duties [citations omitted], and [are] responsible for posting bond to cover any potential liability that [they] may incur by virtue of [their] office [citations omitted]." *Wigger*, 809 P.2d at 1004.

Thus, *Wigger* held that neither Arapahoe County, "sued properly in the name of The Board of County Commissioners of Arapahoe County," nor the sheriff, were capable of immediate dismissal due to Eleventh Amendment immunity under the then recent Supreme Court decision in *Will v. Dept. of Michigan State Police*, but having resolved that threshold issue, the court proceeded to affirm summary judgment in favor of the county, through its board of county commissioners, and the sheriff.

Wigger does not support plaintiff's claims against the county's board of review, or against Jon Roorda or Dan Swallow. The board of review is merely a subunit of county government, appointed by the county commissioners (C.R.S. § 30-28-206), and neither Roorda nor Swallow are elected officials who have statutorily independent powers, duties, or a bond comparable to the elected office of sheriff.

Benes arose out of an appeal under Colo. R. Civ. P. 106(a)(4). That rule provides a narrowly defined and time-limited mechanism for appeal to state district court of a judicial or quasi-judicial lower body decision that allegedly exceeded its jurisdiction or constituted an abuse of discretion, and that no plain, speedy, and adequate remedy is otherwise provided by law.

Such actions are not lawsuits for money damages. They are appeals of judicial or quasi-judicial decisions by lower governmental bodies on narrow grounds.

In the facts underlying *Benes*, the Jefferson County Board of Adjustment granted a variance to Nils Bloom. Benes, an adjoining property owner, filed an action in the district court under Rule 106(a)(4) – an appeal of the board's decision to the grant the variance.

The board of adjustment moved to dismiss contending that the Rule 106 action could only be against the BOCC. The trial court agreed and dismissed the appeal. The court of appeals reversed. Directing that the complaint be reinstated, the court of appeals observed that as a quasi-judicial board with complete authority over whether conditions existed to satisfy the granting of a variance, the board was the "inferior tribunal" whose decision could be appealed under Rule 106(a)(4).

Brown's action here, however, is not an appeal under Colo. R. Civ. P. 106(a)(4). It is an action for damages under 42 U.S.C. § 1983. While *Benes* held that a board of adjustment is a proper defendant in a Rule 106(a)(4) appeal, *Benes* does not support the proposition that boards of adjustment are separately suable units of county government for purposes of claims under 42 U.S.C. § 1983.

REPLY CONCLUSION

Plaintiff attempts to support a vested property right by comparison to *Eason II,* but nothing in that case supports plaintiff's contention that the county's giving her a building permit for a residential structure vested her with rights to avoid zoning ordinances governing uses that require limited impact review, here consisting of outfitting and kennels. Nor does *Eason II* support plaintiff's argument of detrimental reliance, as the county only represented to plaintiff

that her proposed construction of a residential structure was compliant with zoning concerning a residential structure, not non-residential uses of the land.

Nor does the Tenth Circuit case of *Jordan-Arapahoe* support plaintiff's contention that a residential structure building permit created vested property rights exempting her from having to comply with zoning regulations governing other uses of property.

Plaintiff's class-of-one equal protection claim allegations fall short of the requirements set forth in *Kansas Penn Gaming*. Each of the properties that plaintiff alleges as being "similarly situated" differs substantially in use from plaintiff's use of guiding expeditions using horses and hounds to hunt or chase coyotes on public lands. Moreover, even if all other outfitting activities were considered to be similarly situated merely because they fall under the same broad definition, the practical differences between an outfitting activity that involves guiding expeditions using horses and hounds to hunt or chase coyotes on public lands versus other guiding services would give the county a rational basis for treating plaintiff differently.

Plaintiff's arguments fail against the preclusive effect of the state court's permanent injunction order contained in Exhibit A to defendants' motion. (Doc. 30-1).

Finally, plaintiff's claims against entities other than the Chaffee County BOCC must be dismissed. On the claims in this case, the BOCC is the only "person" with capacity to be sued under *Monell*. Plaintiff's cases of *Wigger* and *Benes* are not to the contrary. *Wigger* denied Eleventh Amendment immunity to the Arapahoe sheriff, a separately elected official with statutory responsibilities and a bond independent of the state, in a case alleging civil rights violations arising from a criminal prosecution for child sexual assault. *Benes* recognized that a Rule 106(a)(4) appeal of a quasi-judicial board's decision is properly pled against that board, but

Benes does not support plaintiff's contention that a land use board is the proper "person" to be sued for damages under 42 U.S.C. § 1983.

Respectfully submitted,

By s/*Leslie L. Schluter*
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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on September 2, 2019, I electronically filed the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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