UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

NANCY NEMHAUSER and
LUBOMIR JASTRZEBSKI,

CASE NO. 5:18-cv-87-Oc-30PRL

Plaintiffs,

vs.

CITY OF MOUNT DORA, FLORIDA,
a municipal corporation

Defendant.
_____/

OPPOSITION TO MOTION TO DISMISS

Plaintiffs Nancy Nemhauser and Lubomir Jastrzebski (Nemhauser) submit this brief in opposition to the Defendant City of Mount Dora's Motion to Dismiss.

INTRODUCTION

Nemhauser challenges the constitutionality of the City of Mount Dora's sign code, as well as the City's enforcement of its sign code to an artistic mural painted on Nemhauser's house and surrounding wall. Along with her verified complaint, Nemhauser filed motions for a temporary restraining order and preliminary injunction. (Docs. 2 & 3). On February 20, 2018, this Court issued a Temporary Restraining Order. (Doc. 9). The City and Nemhauser then filed a joint motion agreeing to the entry of a preliminary

injunction, which this Court issued on March 13, 2018. (Doc. 2). The City has now filed a partial motion to dismiss under Rule 12(b).[1]

The City's motion to dismiss should be denied. In moving to dismiss Nemhauser's equal protection argument for failure to state a claim, the City argues that Nemhauser's mural is identical to comparable murals within the City of Mount Dora. Yet, the only basis on which the City distinguishes Nemhauser's mural to other similar murals in the City—its size—has no bearing on whether a mural is a "sign" under Mount Dora code. Thus, the City's sole distinguishing basis is plainly irrelevant to Nemhauser's equal protection claim. Regardless, Nemhauser has properly pled that her mural is identical in all *relevant* respects to other "signs" in the City, making the City's argument, at best, a factual dispute that cannot be properly resolved on a motion to dismiss.

As to Nemhauser's ultra vires and due process claims under Count IV, the City ignores this Court's clear authority to hear pendant state claims and incorrectly classifies Nemhauser's due process claim as *procedural* due process, raising post-deprivation remedy and exhaustion doctrines that are inapplicable to Nemhauser's substantive due process claim.

The City's partial motion for summary judgment should be denied.

[1] The City's Motion to Dismiss addresses only Counts III and IV in Nemhauser's Verified Complaint, and does not answer or seek dismissal of Counts I and II. *See* Motion to Dismiss and Incorporated Memorandum of Law (Doc. 25).

FACTS

Nancy Nemhauser and Lubomir Jastrzebski own the property at 306 West Sixth Avenue, Mount Dora, Florida. Compl. ¶ 8. The property is surrounded on two sides by an exterior wall which was formerly faded, cracked, and peeling. *Id.* ¶ 22.

In July 2017, Nemhauser was approached by a local artist about repainting the wall. Compl. ¶ 5. After discussing potential themes and styles, the family contracted with the artist to paint a mural in the style of "Starry Night," by Vincent Van Gogh, with some additional features representing important parts of Mount Dora. *Id.* ¶ 5. In July 2017, Mount Dora code enforcement left a door hanger on the house, stating that the mural was illegal "graffiti" under City code. *Id.* ¶¶ 25-26. After discussions with code enforcement in which Nemhauser was told the wall was required to match the house, the family contracted with the artist to paint the exterior walls of the house in the same style as the mural on the surrounding wall. *Id.* ¶¶ 26-27.

On September 29, 2017, a code enforcement magistrate held a hearing on the alleged violation. Compl. ¶ 28. At the hearing, the City abandoned the alleged "graffiti" violation under Section 22.960 and proceeded instead on the theory that the house paint was an unpermitted "sign." *Id.* During the hearing, the City was unable to articulate any standard explaining why Nemhauser's mural is a "sign" under the City's code, while other artistic paintings, designs, and objects are not "signs." *Id.* ¶¶ 23-31. The code enforcement officer also expressed personal distaste for the particular content of the mural. *Id.* ¶ 32.

At the end of the hearing, the magistrate ruled that the mural is a sign because "these designs on the wall and house structure . . . attract the attention of the public." Compl. ¶ 35.

The magistrate held that the mural did not fall within any of the categories of signs allowed with a permit, and was therefore an impermissible sign. *Id.* ¶ 34.

The magistrate ordered that Nemhauser paint over the mural within 30 days. Compl. ¶ 36. He further ordered that the wall and structure be painted "in a solid color. No graphics. No design. Nothing that is going to end up attracting the attention of the public." *Id.*

Nemhauser thereafter filed a notice of appeal in the Circuit Court for Lake County, Florida. However, after that filing, the City filed a motion before the magistrate requesting daily accruing fines of $100 per day, and that motion was granted. Compl. ¶ 38. As a result, on February 8, 2018, Nemhauser voluntarily dismissed her appeal from the Circuit Court of Lake County and instead filed a civil rights lawsuit under Section 1983 in this Court, seeking to vindicate her constitutional rights and enjoin enforcement of the City's sign code. *See* Compl. ¶¶ 4-5, 56-94.

ARGUMENT

A. Characterization of the Facts

The City quibbles with Nemhauser's allegations that the mural covers a wall and home on her property. It argues that the factual allegations do not adequately convey the size of the mural to the extent the City would like. It therefore seeks to introduce photographs of the property.[2] The City's discussion is not a legal argument, nor grounds

[2] Defendant city has not cited the appropriate legal standard for introduction of material beyond those attached to the pleadings, nor explained why such additional material is necessary for the resolution of its motion to dismiss. *See, e.g.*, *Fetterhoff v. Liberty Life Assurance Co.*, 282 Fed. Appx. 740, 743 n.1 (11th Cir. 2008).

for dismissal and, in any event, the size and appearance of the mural is not legally relevant to any of Plaintiffs' claims. The City's argument should therefore be ignored.

B. Equal Protection

Nemhauser alleges that the City discriminated against her, in violation of the Equal Protection Clause, when it chose to enforce the sign code against the mural on her property. *See* Compl. ¶¶ 78-85. A plaintiff can assert a "class of one" equal protection violation where she "alleges that she has been intentionally treated differently from others similarly situated and that there has been no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Although it is a heavy burden to ultimately prevail on a class of one claim, it is not insurmountable. *See, e.g.*, *Doe v. Vill. of Mamaroneck*, 462 F. Supp. 2d 520, 546 (S.D.N.Y. 2006) ("[T]he requirement of showing a similarly situated group should not be erected as an insurmountable barrier to plaintiffs' [class of one] equal protection claim."). Nemhauser has properly pled that the City selectively enforced its sign code against her despite not enforcing it against other murals in the City that are comparable in all *relevant* respects. The City disputes the factual similarity between Nemhauser's mural and others within the City, but such factual disputes are not properly decided on a motion to dismiss. Nemhauser should have opportunity to prove her equal protection claim.

To be "similarly situated" for purposes of a class of one claim, a plaintiff must use comparators that are "prima facie identical in all *relevant* respects." *Campbell v. Rainbow City, Ala.*, 434 F.3d 1306, 1314 (11th Cir. 2006) (emphasis added). The City repeatedly

cites the above language, but universally omits the word "relevant."[3] The omission is telling, because the basis on which the City attempts to differentiate the Nemhauser mural is plainly *irrelevant* to whether it is a "sign" under the Mount Dora code.

The City argues that Nemhauser's equal protection claim should be dismissed because the mural "is significantly larger in size and scope than any of the supposed comparators." *See* Motion to Dismiss and Incorporated Memorandum of Law (Doc. 25) at 7. Even if the City is factually correct,[4] the mural's size is not a legally relevant factor in the similarly situated analysis here.[5] The size of the mural has never been cited as a reason for enforcing the sign code in this instance. The only reason the City has given for citing the Nemhauser mural—and the reason accepted by the code enforcement magistrate—is that the mural "attract[s] the attention of the public to [itself]" but does not fall within one of the ten permitted sign categories of the sign code. *See Compl.* ¶ 34-35. But those same criteria apply to all sorts of murals—not to mention flags, mailboxes, house paint, or architectural designs—in the City of Mount Dora. Nemhauser has properly alleged this in her complaint, and she should have the opportunity to prove it to the Court. *Id.* ¶¶ 30-32, 78-85.

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[3] *See* Motion at 6 ("comparators must be prima facie identical in *all respects*"; *id.* at 7 ("comparators are not prima facie identical to Plaintiffs in *all respects*"); *id.* ("nor do Plaintiffs even attempt to allege that those supported comparators are prima facie identical in *all respects*") (emphasis added).

[4] The City provides no evidence that the Nemhauser mural is larger than relevant comparables in the City. If true, and if relevant, the City surely has the opportunity to prove this to the Court at the appropriate time.

[5] To be sure, the size of a project *may* be relevant in other contexts. For example, the social and environmental effects of a 180-unit apartment complex are going to be significantly different from a 16-unit complex, and a governmental decisionmaker may constitutionally weigh the size of the proposed project when determining whether to permit the development in that context. *See Campbell*, 434 F.3d at 1316 n.8. But just because size is relevant in that context, does not mean it is relevant when determining whether something does, or does not, meet the definition of "sign" under Mount Dora code.

Even if the City enforced the sign code against Nemhauser based on the size of the mural, and even if that was a relevant factor to the similarly situated analysis, Nemhauser should have the opportunity to prove that other "signs" in Mount Dora are relevant comparators for her equal protection claim. Indeed, most of the cases cited by the City in its motion were resolved on summary judgment, not on a motion to dismiss. *See* Motion at 6 (citing *Grider v. City of Auburn, Ala.*, 618 F.3d 1240 (11th Cir. 2010) (decided on summary judgment)); *id.* at 6, (citing *Young Apartments, Inc. v. Town of Jupiter, Fla.*, 529 F.3d 1027 (11th Cir. 2008) (same)).

The City's argument amounts to a factual dispute that is premature at the motion to dismiss stage. *Log Creek, LLC v. Kessler*, 717 F. Supp. 2d 1239, 1243 (N.D. Fla. 2010) ("The defendants may ultimately prevail on their assertion that the others weren't really similar, but this is in substance a denial of the complaint's factual allegations. The factual dispute cannot properly be resolved on a motion to dismiss."). Moreover, discovery and additional investigation are likely to lead to additional uncited murals in the City of Mount Dora.

The rare instance where the Court may dismiss a class of one equal protection claim at the pleading stage arises where a discretionary governmental decision is "multi-dimensional, involving varied decision making criteria applied in a series of discretionary decisions made over a period of time." *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1203 (11th Cir. 2007); *see also Leib v. Hillsborough Cnty. Pub. Transp. Comm'n*, 558 F.3d 1301, 1307 (11th Cir. 2009). None of those caveats apply here. The decision to cite Nemhauser's mural was made at a single code enforcement hearing, relying only on the criteria that the

mural "attracts the attention of the public" and does not fall within a permitted category of the sign code. Compl. ¶¶ 29-36.

Nor was enforcement based on a series of well-reasoned discretionary acts over a period of time. Indeed, the decision to cite the mural as an unpermitted sign was made only *after* the City's failed attempt to classify it as illegal graffiti. *Id.* ¶¶ 25-28. When questioned during the enforcement proceeding, the code enforcement officer could provide no other principled reason why this mural was chosen over other murals in the City. *Id.* ¶¶ 29-32. The decision was ad hoc and unprincipled.

This is precisely a scenario where class of one claims are proper. Like *Olech*, there is "a single, one-dimensional standard . . . 'against which departures, even for a single plaintiff, could be readily assessed.'" *Grider*, 618 F.3d at 1263 (quoting *Enquist v. Ore. Dep't of Agric.*, 553 U.S. 591 (2008)).

C. Ultra Vires/Due Process

Nemhauser has sufficiently pled facts that establish a pendent state claim and independent constitutional claim that the city acted ultra vires. She alleged that the text of the sign code does not permit the City to cite her mural, because, even under the City's overly broad definition, the mural is plainly not a "sign." While Florida does not have a statute prohibiting ultra vires action by city agencies, Florida courts have recognized that a municipality "engages in an 'ultra vires' act when it lacks the authority to take the action under statute or its own governing laws." *Liberty Counsel v. Fla. Bar Bd. of Governors*, 12 So. 3d 183, 191-92 (Fla. 2009). This Court has jurisdiction over such pendant claims under 28 U.S.C. § 1367.

Where the government acts arbitrarily and in contravention of its own delegated authority, the pendent ultra vires claim may also be styled as a substantive due process claim in federal court. *See, e.g.*, *Exec. 100, Inc. v. Martin Cnty.*, 922 F.2d 1536 (11th Cir. 1991); *see also Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 789 (2nd Cir. 2007) ("[I]f the Town Board did not have authority for the actions it took regarding Fun Quest's permit—as it appears it did not—the Board's actions were ultra vires and, as a result, sufficiently arbitrary to amount to a substantive due process violation.").

The City relies on *Knight v. Jacobson,* Motion at 8, but in that case, the Eleventh Circuit held that a violation of state law, *alone,* did not constitute a violation of a federal right. 300 F.3d at 1275-76. Unlike *Knight*, Nemhauser does not rely solely on a state cause of action to bring her Section 1983 claim. First, she has brought several other constitutional claims, which are not challenged by the City, so her state ultra vires action is a permissible pendant claim. Second, Nemhauser alleges that the ultra vires action taken by the City violates her right under the Fourteenth Amendment's Due Process Clause to be free from arbitrary government action. She has therefore adequately pled a claim that should not be dismissed.

All cases cited by the City for the proposition that plaintiffs must engage in post-deprivation remedies are relevant only to *procedural* due process claims, not the *substantive* due process claim that Nemhauser has pled. *Cf. Bee's Auto, Inc. v. City of Clermont,* 927 F. Supp. 2d 1318, 1331 (M.D. Fla. 2013) (dismissing only procedural due process claim on grounds of failure to engage in state court review, remanding for review of additional claims); s*ee also Zinermon v. Burch*, 494 U.S. 113, 126-27 (1990). Where

procedures are at issue, the constitutional violation actionable under Section 1983 is not complete "unless and until the State fails to provide due process." *Id.* at 126.[6] However, outside of this limited exception, "the deprivation is complete, and the Due Process Clause has been violated, when the loss of liberty occurs." *Albright v. Oliver*, 510 U.S. 266, 315 (1994).

Nemhauser does not allege that the process provided by the noticed hearing before the magistrate was constitutionally deficient. Nemhauser instead alleges that the action taken was ultra vires because the sign code relied on by the magistrate does not apply to her mural. Compl. ¶¶ 90-92. Further, the magistrate ordered Nemhauser to paint over the mural "with solid color paint," despite the fact that no applicable law, ordinance, or regulation requires it. Compl. ¶ 94. Nemhauser has properly alleged that the actions of the City were taken without proper justification and showed evidence of animus towards the content of her mural. Compl. ¶ 29-32; s*ee Cine SK8*, 507 F.3d at 789. These allegations properly raise a substantive due process claim cognizable under Section 1983. *Id.* The procedural due process precedent cited by the City is irrelevant.

The City also argues that Plaintiffs had to first pursue their ultra vires claim in state court before bringing it in federal court.[7] *See* Motion at 10. But each case cited by the City

[6] Indeed, doctrines involving post-deprivation remedies stem from the understanding that government may occasionally need to act rapidly, and the existence of "random and unauthorized" action by government employees makes providing prior process "impracticable or impossible." *Gilmere v. City of Atlanta, Ga.*, 737 F.2d 894, 906 (11th Cir. 1984), *on reh'g*, 774 F.2d 1495 (11th Cir. 1985); *Hudson v. Palmer*, 468 U.S. 517, 532 (1984). Where—as here—a deprivation is based on the actions of an official with authority over the activities alleged in the complaint, abuse of that authority is not considered "random and unauthorized," and there is no requirement to engage in post-deprivation remedies. *Zinermon*, 494 U.S. at 132.

[7] Nemhauser's ultra vires and Section 1983 claims would have been cognizable in state court. Such claims may be properly raised in either forum. *Cf. Mastrangelo v. City of St. Petersburg*, 890 F. Supp. 1025, 1029 (M.D. Fla. 1995) (exercising Younger abstention because an appeal was simultaneously pending in state court). However, Nemhauser voluntarily dismissed her state court appeal before filing this action.

involves plaintiffs seeking pre-enforcement review of *federal* agency action where *federal* law mandated administrative review procedures. *See LabMD, Inc. v. FTC*, 776 F.3d 1275 (11th. Cir. 2015) (the court held that it could not independently evaluate an ultra vires claim where there was not yet "final agency action" that could trigger judicial review under the federal Administrative Procedure Act); *Doe v. F.A.A.*, 432 F.3d 1259, 1262 (11th Cir. 2005) (plaintiffs required to first appeal to the National Transportation Safety Board, then to a federal court of appeals under Federal Aviation Act); *and GOS Operator, LLC v. Sebelius*, 843 F. Supp. 2d 1218, 1223 (S.D. Ala. 2012) (holding that the Medicare Act requires claimants to abide by special review procedures before raising claim in federal court). Here, however, Nemhauser raises a federal substantive due process claim under Section 1983, which does not require a plaintiff to exhaust state administrative remedies before filing in federal court. *See Patsy v. Bd. of Regents of the State of Fla.*, 457 U.S. 496, 516 (1982).

CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully request this Court deny the Defendant's motion to dismiss.

DATED: March 27, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day, March 27, 2018, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

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