No. 19-40717

In the United States Court of Appeals for the Fifth Circuit

CAMERON COUNTY HOUSING AUTHORITY; COMMUNITY HOUSING & ECONOMIC DEVELOPMENT CORPORATION,

PLAINTIFFS - APPELLANTS,

v.

CITY OF PORT ISABEL; CITY OF PORT ISABEL CITY COMMISSION; PORT ISABEL PLANNING AND ZONING COMMISSION,

DEFENDANTS - APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, BROWNSVILLE DIVISION

REPLY BRIEF OF APPELLANTS

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TO THE HONORABLE FIFTH CIRCUIT COURT OF APPEALS:

Plaintiffs-Appellants **CAMERON COUNTY HOUSING AUTHORITY AND COMMUNITY HOUSING & ECONOMIC DEVELOPMENT CORPORATION** ("Appellants" or the "Housing Authority") hereby reply to the points made in the brief filed by Defendants-Appellees City of Port Isabel; City of Port Isabel City Commission; and Port Isabel Planning and Zoning Commission ("Appellees" or the "City").

INTRODUCTION

Throughout its brief, the City ignores the requirement that, in an appeal from a summary judgment, the Court view the evidence in the light most favorable to the non-movant. *See Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014) (per curiam). In particular, the City's brief is replete with issues of disputed fact. Among other things, the City accuses Appellants of acting "haphazardly," and failing, "to identify a development plan." The City also raises, "concerns for health, safety, and welfare of residents." Appellants have presented evidence that the City's contentions on these issues are erroneous, but perhaps more importantly for present purposes, these are unquestionably the type of factual issues that are inappropriate for summary judgment and must be determined by the trier of fact.

There is no dispute in this case that Appellants were injured – namely, Appellants lost nearly $2 million in federal disaster relief funds, which prevented

Appellants from constructing a multi-family affordable housing complex for the benefit of low-income Latino residents of Cameron County, which had been destroyed by Hurricane Dolly. The question in this appeal is whether that injury is fairly traceable to the actions of Appellees. Appellees incorrectly contend, and the district court agreed, that because the Port Isabel City Commission failed to vote on the Housing Authority's various requests and proposals, the injury is not traceable to the City and the Housing Authority lacks standing. For any number of reasons, that cannot be the law. That erroneous legal standard would completely eviscerate the Fair Housing Act ("FHA"), because any municipality could simply sit back – "do nothing" – and never risk facing liability under the FHA. The City has not pointed to any law directly on point, and to the contrary, there is legal precedent supporting the proposition that "omissions" and the "failure to rezone" can establish sufficient bases to support a cause of action under the FHA.

In addition, the City has failed to provide any authority establishing that it was the Housing Authority's obligation to present its re-zoning and additional requests to the City Commission after the Port Isabel Planning & Zoning Commission ("P&Z Commission") denied the requests. To the contrary, the Secretary of the P&Z Commission testified that it was the responsibility of the Port Isabel City staff to carry the matter from the P&Z Commission to the City Commission. The evidence shows that the City failed to do so.

REPLY ARGUMENT AND AUTHORITIES

A. Appellants Have Proffered Extensive Evidence of Intentional Discrimination By the City Based on Race.

Appellee incorrectly contends that, "Appellants identified no evidence of intentional discrimination by the City on the basis of race." Br. of Appellee at 21. Whether there was intentional discrimination is a highly fact intensive inquiry and Appellants have set forth extensive evidence of intentional discrimination. By way of example, Appellants have shown that Appellants' first formal request for re-zoning was denied by the P&Z Commission based upon vehement and racially charged opposition from an overwhelmingly Anglo group of surrounding residents. ROA.623-625. Similarly, Appellants have shown that when the Housing Authority attempted to present its second request to the P&Z Commission, the City Manager, Jared Hockema, used intimidation to thwart the attempt, threatening that the Housing Authority should not appear or it would be "explosive and embarrassing." ROA.601, 648, 649. Along these lines, the Housing Authority met with City officials who stated the City would never allow the Housing Authority to re-develop an affordable housing complex on the premises, and that the City would not approve permitting even for a proposal that did not require any zoning changes. ROA.632, 631. At a minimum, there is a question of fact as to whether the City intentionally blocked the project based, in part, on racial discrimination.

In addition, Appellee's brief only argues that the Housing Authority did not provide evidence of discrimination on the basis of race. The City does not dispute, at any point in its brief whether the Housing Authority has presented sufficient evidence to raise a genuine issue of material fact as to whether the City discriminated against Appellants on the basis of national origin and/or familial status. Nor did the City's Motion for Summary judgment address familial status discrimination claims. In a Motion for Summary Judgment, the moving party bears the burden of "pointing out the lack of evidence to support the nonmoving party's case." *ContiCommodity Servs., Inc. v. Ragan*, 63 F.3d 438, 441 (5th Cir. 1995). In other words, the moving party must point to specific facts, considered undisputed, that establish that the moving party is entitled to summary judgment. *See Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995); *see also* Fed. R. Civ. P. 56(c) ("A party asserting that a fact cannot be or is genuinely disputed must support the assertion by [ ] citing to particular parts of materials in the record . . . ."). The City has never pointed to specific, alleged, undisputed facts, regarding claims of familial status discrimination.

B. Discriminatory Animus Displayed by Members of the Public is Sufficient to Support a Finding of Intentional Discrimination by the City.

Appellants do not have to show that government officials made discriminatory statements themselves in order to prove direct discrimination—

discriminatory animus displayed by members of the public alone is enough to support a finding of intentional discrimination by government officials; the expression of discriminatory animus by such officials themselves is not necessary to prove discriminatory intent. Appellees misstate this Court's holding in *Artisan/American Corp. v. City of Alvin*, 588 F.3d 291 (5th Cir. 2009) to assert that comments that do not specifically mention race or other protected class status would be insufficient evidence to support a reasonable inference of racial animus. This Court's opinion in *Artisan/American*, however, states that there was insufficient summary judgment evidence because the unsupported assertion of one Plaintiff was not sufficient, not because such statements in and of themselves would not support a reasonable inference of racial animus. *Artisan/Amercian Corp.*, 588 F.3d at 298.

Federal Courts have held repeatedly that comments that do not directly refer to race can be "camouflaged racial expressions," that indicate discriminatory animus towards persons in protected classes. In *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Par.*, the Court held that an ordinance placing a 12-month moratorium on multi-family housing was racially discriminatory in violation of the FHA, and in analyzing the "sequence of events" factor, the Court explained that courts have been particularly troubled by expressions that are found

to be "camouflaged racial expressions," such as references to "ghetto," "crime," "blight," and "shared values." 641 F. Supp. 2d 563, 571–72 (E.D. La. 2009).

Particularly relevant to this case is *Avenue 6E Investments, LLC v. City of Yuma, Ariz*, 818 F.3d. 493 (9th Cir., 2016), in which the court found that "code words consisting of stereotypes of Hispanics" very similar to the kinds of coded expressions made by community members in Port Isabel, including concerns about large households, more than one family in a housing unit, parking, unattended children, and crime, "provide plausible circumstantial evidence that community opposition to Developers' proposed development was motivated in part by animus" and that the City was aware of those expressions of animus when it took discriminatory actions. *Avenue 6E v. Yuma* at 506-507. The court in *Avenue 6E* also noted that the plaintiffs in that case were known as a developer of "Hispanic neighborhoods." Similarly, the Cameron County Housing Authority is known as a developer of affordable housing overwhelmingly occupied by persons who are Hispanic/Latino. In this case, the record contains direct evidence of statements expressing discriminatory animus on the basis of race, national origin, and familial status.

Nor does the Housing Authority need to prove that discriminatory animus was the sole reason for challenged action or omission. "Rarely can it be said that a legislative or administrative body operating under a broad mandate made a

decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one" *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 49 U.S 255 (1977) Determining whether discriminatory animus was a motivating factor "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.*, 266. For the purposes of summary judgment, "any indication of discriminatory motive may suffice to raise a question that can only be resolved by a fact-finder." *Pacific Shores Properties v. Newport Beach*, 730 F.2d at 1156 (9th Cir. 2014) *quoting McGinest v. GTE Serv. Corp*., 360 F.3d 1103, 1124 (9th Cir.2004) There is clearly sufficient evidence, including direct evidence, to indicate discriminatory motive.

C. The Viability of Appellants' Proposals for an Affordable Housing Complex Raises Questions of Fact for the Jury.

Appellees' brief is replete with issues, which, on their face, raise disputed questions of material fact. More specifically, Appellees expend significant effort in the briefing examining whether Appellants' proposals complied with Port Isabel City Codes – primarily in relation to the City's pre-textual concerns related to parking. Br. of Appellee at 7-9. These intensely disputed subjects unquestionably raise fact issues for the jury, and there is extensive evidence in the record establishing that Appellants undertook substantial efforts to formalize plans specifically tailored to address the concerns raised by the City (and the Anglo

neighbors, pretextual as they were). ROA.862, 863. Moreover, Appellees' suggestion that Appellants applied for federal grant funds to re-develop the apartment complex without first investigating, "whether such a project would comply with City Code health and safety requirements," is absurd, because there had been a multi-family complex of a similar size on that lot for decades prior to Hurricane Dolly. Br. of Appellee at 13.

D. Identifying Similarly Situated Individuals Who Were Treated Better Is Not The Only Way to Establish a Claim of Intentional Discrimination.

"Although plaintiffs in an anti-discrimination lawsuit may survive summary judgment by identifying similarly situated individuals who were treated better than themselves, this is not the only way to demonstrate that intentional discrimination has occurred. Where, as here, there is direct or circumstantial evidence that the defendant has acted with a discriminatory purpose and has caused harm to members of a protected class, such evidence is sufficient to permit the protected individuals to proceed to trial under a disparate treatment theory." *Pacific Shores Properties, LLC v. City of Newport Beach,* 730 F.3d 1142 at 1147-1148 (9th Cir. 2013). "Our cases clearly establish that plaintiffs who allege disparate treatment under statutory antidiscrimination laws need not demonstrate the existence of a similarly situated entity who or which was treated better than the plaintiffs in order to prevail." *Id*. (citations omitted). "Proving the existence of a similarly situated entity is only one way to survive summary judgment on a disparate treatment

claim." *Id*. (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

E. Appellees Erroneously Contend That a Final Vote by the City Commission on Appellants' Affordable Housing Complex is Necessary to Establish an Injury Traceable to Appellees.

While there is no Fifth Circuit case directly on point, the Second Circuit opinion in *Huntington* is squarely on all fours for the proposition that zoning cases under the FHA do not a require a final vote and determination by the discriminating municipality on a specific issue. *Huntington* (and the plain language of the FHA which prohibits discriminatory "omissions"), makes it one hundred percent clear that municipality defendants can violate the act through inaction. That was the case here and in *Huntington*. Indeed, the standard applied by the district court cannot be the law, because any municipality defendant could simply sit back and refuse to vote on re-zoning requests and never risk liability under the FHA. The standard applied would completely eviscerate the Act.

The finding that the Housing Authority never asked the City Commission to take official action is clearly erroneous. The process for requesting zoning changes is initiated through the P&Z Commission, and as Defendant has repeatedly asserted, the P&Z Commission does not have final authority to approve or reject platting and zoning changes; its decisions are merely recommendations to the City Commission, which then has the responsibility for granting final approval or

denial. Defendant has not claimed that there is any alternative process through which the Housing Authority could have requested these changes directly from the City Commission, nor has it produced any evidence that the Housing Authority was responsible for directly requesting a formal vote from the City Commission. The Housing Authority submitted two requests for replatting and rezoning to the Port Isabel P & Z Board. There is no dispute that the Housing Authority continued their attempts obtain replatting and rezoning of the Neptune site and at no point abandoned the project.

Ramona Kantack Alcantara, P&Z Commission Secretary at the time the Housing Authority submitted their first request for re-zoning and replatting, and who made the motion to deny those changes, testified that it was the responsibility of the city staff to administratively communicate the P&Z Board's recommendation to the City Commission.

> Mr. Riemer: Okay. And what is the process for that recommendation going from the planning and zoning commission to the city council?
>
> Ms. Alcantara: That was something that was handled administratively by the city staff, so could make our decision, and then that was communicated, as I understand, to the city council.

ROA.888.

In June 2015, The Housing Authority submitted a second application to the P&Z Board. Just prior to the meeting, however, the City Manager convinced the Housing Authority not to attend the meeting because it would be "explosive and

embarrassing." The Housing Authority then requested building permits for 10-units, which did not require a zoning change.

The Housing Authority went above and beyond their obligations under City Ordinance to initiate the process of seeking a zoning change and address concerns expressed by the City and the public. The district court's ruling therefore, that "there is no evidence . . . that the Housing Authority ever asked the City Commission to take any such official action," is clearly erroneous.

The City repeatedly asserts in its brief that the Housing Authority failed to request a decision from the City Commission on its requested zoning change, but has produced no evidence that City policy required the Housing Authority to do so, or any evidence that such policy existed. In her deposition, former P&Z Commissioner Alcantara testified that it was her understanding that city staff conveyed the P&Z Board's recommendation to the City Commission. ROA.888.

In other words, the City is arguing that it was the Housing Authority's responsibility to request a decision by the City Commission, when the City Ordinance does not address the process, and a P&Z Commissioner understood that it was City staff's responsibility to do so. It is unclear how the Housing Authority was expected to know that it had to ask the City Commission for a final decision when contemporaneous P&Z members testified that they understood taking the recommendation to the Commission to be city staffs' responsibility. Nor has the

City produced any evidence that members of the public are able to place items on the City Commission's agenda without any approval by the City's staff or the commissioners themselves. The record contains sufficient evidence to show that there is a genuine issue of material fact about whether the Housing Authority was required to request a decision from the City Commission, and whether the City's customs and practices in themselves were discriminatory.

The City's brief does not respond to these arguments or dispute these facts, but merely asserts without evidence that the Housing Authority was responsible for obtaining a decision from the City Commission and restates the erroneous standard that only an official vote by the City Commission constitutes official action sufficient to support standing.

F. Appellants Filed This Suit Within The Statute of Limitations Period.

While the District Court did not address the issue, Appellees erroneously contend that Appellants did not file this case within the statute of limitations period. After the first P&Z Commission meeting in March 2015, despite the vigorous and racist opposition to the project by community members, Plaintiffs diligently continued their efforts to rebuild affordable housing, by among other things, repeatedly altering the plans to try and appease the neighbors though December 2015. Indeed, Plaintiffs claims under the federal Fair Housing Act were

not ripe until December 2015, when Plaintiffs lost the federal grant funds as a result of Defendants' wrongful conduct.

The continuing violation doctrine applies to "the continued enforcement of a discriminatory policy," and allows a plaintiff to "sue on otherwise time-barred claims as long as one act of discrimination has occurred ... during the statutory period." *Hipp v. Liberty Nat. Life Ins. Co*., 252 F.3d 1208, 1221 (11th Cir.2001) (per curiam). The governing law on the continuing violation doctrine in the FHA context is drawn from the Supreme Court's decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380–81, 102 S. Ct. 1114, 1125, 71 L. Ed. 2d 214 (1982).

In *Havens*, plaintiffs identified five separate incidents of discrimination: on March 14, March 21, March 23, July 6, and July 13 of 1978. *See Havens*, 455 U.S. at 380, 102 S.Ct. 1114. But only the incident on July 13 was within the limitations period. *Id*. The Supreme Court held that, "a 'continuing violation' of the Fair Housing Act should be treated differently from one discrete act of discrimination." *Id*., at 380–81. The Court further held that, "Where the challenged violation is a continuing one, the staleness concern disappears." Importantly, the Court held that, "Petitioners' wooden application of § 812(a), which ignores the continuing nature of the alleged violation, ***only undermines the broad remedial intent of Congress embodied in the Act.***" *Id*. (emphasis added). At the time, the statute of limitations for FHA claims was 180 days, and the Supreme Court held that where a

plaintiff, "challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice." *Id*.

The well-settled law emanating from *Havens* is directly on point with the case at hand. While certain of the discriminatory incidences underlying Plaintiffs claims in this matter arguably occurred outside the limitations period, Defendants undoubtedly continued their discriminatory conduct well into the statutory period. Indeed, the discriminatory conduct complained of continues to this day.

Plaintiffs' complaint alleges a continuing violation of the Fair Housing Act, not one discrete act of discrimination. The City of Port Isabel continued to engage in discriminatory conduct through at least November 10, 2015. "[W]here a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within [two years] of the last asserted occurrence of that practice." *Havens Realty Corporation*, 455 U.S., at 381. Plaintiffs' complaint was filed within two years of November 10, 2015, therefore, the complaint was filed within the statute of limitations.

In addition, while civil rights actions, such as those filed under §1983, use the statute of limitations based on state law, the time of accrual of a civil rights action remains a matter of federal law. *Wallace v. Kato*, 127 S.Ct. 1091, 1095

(2007). A cause of action accrues when Plaintiffs have a "complete and present cause of action." *Wallace*, 127 S.Ct. at 1094. One of the primary injuries that Plaintiffs allege is the loss of over one million dollars in federal Community Development Block Grant for Disaster Recovery (CDBG-DR) funds for rebuilding the Neptune Apartments. These funds were reallocated by the LRGVDC on December 1, 2015. Until that date, Plaintiffs did not have a "complete and present cause of action."

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing pleading was served by delivering the same to the person listed below in the manner and on the date indicated:

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Dated this the 23rd day of December 2019.

/s/ Benjamin Ledbetter Riemer
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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this document was produced in proportionally spaced typeface (Times New Roman, 14 point font) on a computer using Microsoft Word. The document contains 3,701 words according to the computer software's word-count function, excluding the sections of the document listed in Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Benjamin Ledbetter Riemer
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