UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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FRANCES ZITO,

Plaintiff,

-against-

MEMORANDUM & ORDER
09-CV-4202(JS)(AKT)

TOWN OF BABYLON, MARYANN ANDERSEN, individually and as Senior Building Inspector for the Town of Babylon, JOHN DOES 1 through 10, and JANE DOES 1 through 10,

Defendants.
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APPEARANCES

For Plaintiff: Robert P. Lynn, Jr., Esq.
Lynn Gartner & Dunne, LLP
330 Old Country Road, Suite 103
Mineola, NY 11501

For the Moving Defendants: Mark A. Cuthbertson, Esq.
Jessica P. Driscoll, Esq.
Law Offices of Mark A. Cuthbertson
434 New York Avenue
Huntington, NY 11743

For John & Jane Doe Defendants: No appearances.

SEYBERT, District Judge:

Plaintiff Frances Zito ("Plaintiff") commenced this action on September 29, 2009 against Defendants Town of Babylon (the "Town") and Maryann Andersen ("Andersen") (collectively, the "Moving Defendants") and John and Jane Does 1 through 10. Presently pending before the Court is the Moving Defendants' motion for summary judgment. For the following reasons, the

motion is GRANTED and Plaintiff's Complaint is DISMISSED in its entirety.

BACKGROUND[1]

In August 1996, Plaintiff purchased property located at 519 North Wellwood Avenue in Lindenhurst, New York (the "Property"). (Defs. 56.1 Stmt. ¶ 1.) At the time of purchase, there were two certificates of occupancy for the Property: one issued in 1951 for an "office building" (the "1951 CO") and the other issued in 1996 for a 12.9 percent "extension [of the building] for storage room and roof overhang" (the "1996 CO"). (Defs. Ex. E.) Although the Property was located in a residential zone, both the 1951 CO and the 1996 CO list the Property as located in a business zone and, since the 1980s, the Property had always been used to operate a deli. (Defs. Exs. B, E; Defs. 56.1 Stmt. ¶ 8; Pl. Opp. 3.) After purchasing the Property, Plaintiff continued the operation of the deli. (Defs. 56.1 Stmt. ¶ 48.)

In April 1997, the Town sent a letter to the Property's prior owners, John and Mary Noto, stating: "This letter is to inform you that there is no certificate of occupancy for change of use to a Delicatessen at 519 North

[1] The following material facts are drawn from the parties' Local Civil Rule 56.1 Statements ("56.1 Stmt.") and their evidence in support. Any relevant factual disputes are noted.

Wellwood Avenue." (Defs. Ex. O.) Thus, on April 16, 1997, Mr. Noto submitted an application for a "CO for deli" which listed Plaintiff as the owner of both the Property and the deli-business; however, no certificate of occupancy related to this application was ever issued. (Defs. Exs. I, O.)

In September 1998, a Town inspector issued Plaintiff a summons for operating a deli without a certificate of occupancy to which she eventually pled guilty. (Pl. 56.1 Stmt. ¶ 52; Defs. Ex. J.) Thereafter, in May 1999, Plaintiff applied for a building permit to perform "site improvements for deli use." (Defs. Exs. Q, R.) The Town issued Plaintiff a building permit on June 26, 2000 for "site improvements" to expire on December 26, 2000. (Defs. Ex. S.) The work, however, was not completed by December 2000, and, in April and November 2002, Plaintiff was issued summonses for operating a deli without a certificate of occupancy, for performing work with an expired building permit, and for hanging a sign without a permit--all of which were eventually dismissed. (Defs. Exs. J, F at 172.) The Town issued Plaintiff additional summonses in 2004 for operating a deli without a certificate of occupancy to which she pled guilty in September 2004. (Defs. Ex. J.)

Plaintiff completed the site improvements later that month, and, on September 21, 2004, the Town issued her a certificate of occupancy for the Property for "site improvements

for deli" (the "2004 CO"). (Defs. Ex. T.) The Property remained a deli until November 2004 when Plaintiff evicted the tenant who had been operating the business. There has been no deli in operation on the Property since that date. (Defs. 56.1 Stmt. ¶ 70; Pl. 56.1 Stmt. ¶ 70.)

A few months later, Peter Casserly, the Town's then-Commissioner of Planning and Development, informed Plaintiff that the 2004 CO had been issued by mistake. (Defs. 56.1 Stmt. ¶ 71.) So, rather than reopen the deli, Plaintiff submitted two applications for building permits to subdivide the Property into two lots and build a single-family home on each. (Defs. 56.1 Stmt. ¶ 74; 80.) These applications were denied in March 2007. (Defs. 56.1 Stmt. ¶ 76.) In April 2007, Plaintiff submitted applications for variances to the Zoning Board of Appeals ("ZBA"), which were also denied. (Defs. 56.1 Stmt. ¶¶ 77-79, 86; Defs. Exs. V, W, Y.) Plaintiff made no further attempts to develop the Property residentially.

Instead, in the summer of 2008, Plaintiff decided to reopen the deli. (Defs. 56.1 Stmt. ¶ 90.) She hung a "Grand Reopening" sign, hired someone to replace the building's sheetrock and clean, and purchased some pre-packaged goods for resale. (Defs. 56.1 Stmt. ¶¶ 93, 98-100.) Defendant Andersen, a Town Zoning Inspector, inspected the Property on July 3, 2008 after receiving a complaint that a sign had been hung in

violation of the Town's prohibition on signs and issued Plaintiff a summons. (Defs. 56.1 Stmt. ¶¶ 94, 96-97.) Defendant Andersen returned to the Property on August 6, 2008 after receiving a complaint that work was being performed without a permit. (Defs. 56.1 Stmt. ¶ 102.) Although no work was being performed, Defendant Andersen signed an Accusatory Instrument for "no certificate of occupancy," and obtained a warrant to search the premises. (Defs. Exs. J, CC; Defs. 56.1 Stmt. ¶ 108.) Upon executing the search warrant, Defendant Andersen observed changes to the Property, including new sheetrock and the installation of an "ansul system," and issued summonses for making interior alterations without a building permit, for operating a deli without a valid certificate of occupancy, and for installing an ansul system without a plumbing permit. (Defs. 56.1 Stmt. ¶¶ 111-112.) Plaintiff was ultimately found not guilty of these charges at trial before Judge Joseph Santorelli in the Suffolk County District Court. (Defs. Exs. HH, II.)

On May 21, 2009, Plaintiff received a letter dated May 14 from the Town's Chief Building Inspector Tim Besemer enclosing the 2004 CO and stating as follows:

> The above referenced certificate of occupancy (copy enclosed) is in jeopardy of being revoked. The enclosed certificate of occupancy should read "site improvements." This is to confirm that there is no

> certificate of occupancy on file within the Town of Babylon for a deli.
>
> Please contact this office within seven (7) days of receipt of this notice in order to be heard prior to a determination as to revocation. Said opportunity must be exercised within seven days of receipt of this notice or the certificate of occupancy revocation determination will be based upon the Building Inspector's independent determination.

(Defs. Ex. KK.)

On May 29, 2009, Plaintiff's lawyer, Steven Livingston, Esq. faxed, a letter to Mr. Besemer asking for "any legal authority which allows for a senior building inspector to unilaterally revoke/amend a certificate of occupancy five years after said certificate of occupancy was issued by the Town." (Defs. Ex. LL.) The letter also stated that the 2004 CO authorized the use of the Property as a deli and that such a reading of the 2004 CO was confirmed by Judge Santorelli when he found Plaintiff not guilty of operating a deli without a valid certificate of occupancy. (Defs. Ex. LL.)

On June 2, 2009, Deputy Town Attorney Joseph Wilson responded to Mr. Livingston's letter, stating that:

> [T]he Town is well within the law in the procedure taken to revoke the Certificate of Occupancy, issued erroneously and unlawfully. Moreover, your client had notice and opportunity to appear for a hearing and present evidence on her behalf regarding the revocation of said Certificate of Occupancy, she failed to do so. The Town

> has not denied her due process right, she has failed to participate in her due process hearing.

(Defs. Ex. MM.) The letter stated that Mr. Livingston could "protect [his] client's rights by bringing the appropriate action in the appropriate court." (Defs. Ex. MM.)[2]

On June 11, 2009, Mr. Besemer sent Plaintiff a letter stating: "Please be advised after a thorough review of records on file in the Town of Babylon, the [2004 CO] should have read: 'site improvements.'" (Defs. Ex. NN.) Plaintiff never appealed or otherwise challenged this purported revocation/modification of the 2004 CO.

Plaintiff submitted a notice of claim to the Town on June 15, 2009 and commenced this action on September 29, 2009. Plaintiff's Complaint asserts that: (1) Defendants selectively enforced the Town Code and local zoning laws against Plaintiff, as compared to other similarly situated individuals, in

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[2] The letter also addressed Mr. Livingston's comment about Judge Santorelli:

> With regard to the Honorable Judge Santorelli, a criminal judge presiding over a criminal action, judged the case before him upon the correct burden of proof, beyond a reasonable doubt. Judge Santorelli did not and could not pass upon the validity of the Certificate of Occupancy or its revocation. That jurisdiction lies with the Supreme Court and is a civil matter.

(Defs. Ex. MM.)

violation of the Equal Protection Clause of the Fourteenth Amendment; (2) Defendants denied Plaintiff her rights to procedural due process by failing to provide her with meaningful notice and an opportunity to be heard before revoking the 2004 CO; and (3) Defendants denied Plaintiff her rights to substantive due process by arbitrarily and capriciously revoking the 2004 CO. She also asserts claims under New York state law for malicious prosecution and abuse of process.

DISCUSSION

At the outset, the Court is "mindful that federal courts should not become zoning boards of appeal to review nonconstitutional land use determinations by the circuit's many local legislative and administrative agencies." See Sullivan v. Town of Salem, 805 F.2d 81, 82 (2d Cir. 1986). Generally, "[f]ederal judges lack the knowledge of and sensitivity to local conditions necessary to a proper balancing of the complex factors that enter into local zoning decisions." Id. However, the Second Circuit informs that the federal courts "should entertain such claims where a landowner's constitutional rights are indeed infringed by local land-use actions." Zahra v. Town of Southhold, 48 F.3d 674, 680 (2d Cir. 1995). With this in mind, the Court will first address the Moving Defendants' motion for summary judgment. The Court will then briefly address Plaintiff's claims against the John and Jane Doe defendants.

I. The Moving Defendants' Motion

The Moving Defendants move for summary judgment on Plaintiff's § 1983 claims on the grounds that: (1) the Court lacks subject matter jurisdiction because the claims are not ripe and (2) the claims are time-barred. The Moving Defendants also argue that (3) Andersen is shielded from suit for claims under § 1983 by the doctrine of qualified immunity; (4) there is no evidence in the record that the conduct alleged occurred pursuant to a town custom, practice, or policy which is necessary to hold the Town liable under § 1983; and (5) Plaintiff's equal protection claim fails as a matter of law because there is no evidence in the record of selective treatment. The Moving Defendants are not moving for summary judgment on Plaintiff's state law claims but, rather, are asking the Court to decline to exercise supplemental jurisdiction and dismiss them without prejudice.

The Court will first discuss the standard of review applicable on a motion for summary judgment. The Court will then address the merits of the Moving Defendants' arguments.

A. Standard of Review

"Summary judgment is appropriate where there are no genuine disputes concerning any material facts, and where the moving party is entitled to judgment as a matter of law." Harvis Trien & Beck, P.C. v. Fed. Home Loan Mortg. Corp. (In re

Blackwood Assocs., L.P.), 153 F.3d 61, 67 (2d Cir. 1998) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "In assessing the record to determine whether there is a genuine issue to be tried as to any material fact, the court is required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." McLee v. Chrysler Corp., 109 F.3d 130, 134 (2d Cir. 1997).

"The burden of showing the absence of any genuine dispute as to a material fact rests on the party seeking summary judgment." Id.; see also Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970). A genuine factual issue exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. To defeat summary judgment, "the non-movant must 'set forth specific facts showing that there is a genuine issue for trial.'" Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000) (quoting Anderson, 477 U.S. at 256). "Mere speculation or conjecture as to the true nature of the facts" will not overcome a motion for summary judgment. Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 12 (2d Cir. 1986); see also Williams v. Smith, 781 F.2d 319, 323 (2d Cir. 1986) ("Mere conclusory

allegations or denials will not suffice."); Weinstock, 224 F.3d at 41 ("[U]nsupported allegations do not create a material issue of fact." (citing Goenaga v. March of Dimes Birth Defects Found., 51 F.3d 14, 18 (2d Cir. 1995)).

B. Equal Protection Claim

The Moving Defendants argue that Plaintiff's equal protection claim must be dismissed: (1) as abandoned (Defs. Reply 1) and (2) because "Plaintiff has not produced any evidence of similarly situated property owners" (Defs. Mot. 12-13; Defs. Reply 1). The Court agrees on both grounds. First, "[f]ederal courts may deem a claim abandoned when a party moves for summary judgment on one ground and the party opposing summary judgment fails to address the argument in any way." Taylor v. City of New York, 269 F. Supp. 2d 68, 75 (E.D.N.Y. 2003). Here, the Moving Defendants moved for summary judgment on Plaintiff's equal protection claim, yet Plaintiff, in her opposition brief, did not even mention her equal protection claim, let alone address the Moving Defendants' arguments. Accordingly, the Court deems Plaintiff's equal protection claim abandoned. See Hyek v. Field Support Servs., Inc., 702 F. Supp. 2d 84, 102 (E.D.N.Y. 2010) (collecting cases). Second, to prevail on her equal protection claim, Plaintiff must establish "that [she] w[as] intentionally treated differently from other similarly situated-individuals without any rational basis."

Clubside, Inc. v. Valentin, 468 F.3d 144, 159 (2d Cir. 2006) (citing Vill. of Willowbrook v. Olech, 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000)). Yet Plaintiff has failed to identify--and the Court, after scouring the record, was unable to find--any evidence of "similarly situated individuals" treated differently than Plaintiff. Accordingly, there is no issue of fact requiring trial and the Moving Defendants are entitled to summary judgment on Plaintiff's equal protection claim. See Toussie v. Cnty. of Suffolk, 806 F. Supp. 2d 558, 577 (E.D.N.Y. 2011) (granting summary judgment in favor of defendants when plaintiffs failed to produce any evidence of similarly situated individuals); see also Ruston v. Town Bd. for Town of Skaneateles, 610 F.3d 55, 59 (2d Cir. 2010); Prestopnik v. Whelan, 249 F. App'x 210, 213-214 (2d Cir. 2007).

C. Due Process Claims

The Moving Defendants' argue that they are entitled to summary judgment on Plaintiff's due process claims because, inter alia, the Court lacks subject matter jurisdiction. Because the Court finds that it lacks subject matter jurisdiction, it will not address the Moving Defendants' other arguments.

1. Subject Matter Jurisdiction

It is well settled that "[t]o be justiciable, plaintiff['s] claims must be ripe for federal review," Thomas v.

City of N.Y., 143 F.3d 31, 34 (2d Cir. 1998); accord Marchi v. Bd. of Coop. Educ. Servs., 173 F.3d 469, 478 (2d Cir. 1999), and the Supreme Court has established a two-pronged test to determine whether constitutional claims asserted in the land-use context are ripe, Williamson Cnty. Reg'l Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186, 194-95, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).[3] The first prong requires a "final decision" from a state regulatory entity, Williamson, 473 U.S. at 186; see also Murphy v. New Milford Zoning Comm'n, 402 F.3d 342, 348 (2d Cir. 2005) (stating that before commencing a takings-type suit, a plaintiff must "obtain a final, definitive position as to how it could use the property from the entity charged with implementing the zoning regulations"), and the second prong requires plaintiff to have sought just compensation by means of "reasonable, certain and adequate" state provisions for obtaining compensation, Williamson, 473 U.S. at 186, 194-95.

2. Plaintiff's Claims are Not Ripe

The Moving Defendants argue that Plaintiff's procedural and substantive due process claims are not ripe

[3] Although announced in the context of a Fifth Amendment takings claim, the ripeness test articulated in Williamson, has been extended by the Second Circuit to procedural and substantive due process claims challenging land-use restrictions. See Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals, 282 F.3d 83, 88-89 (2d Cir. 2002) (procedural due process); Southview Assocs. Ltd. v. Bongartz, 980 F.2d 84, 96-97 (2d Cir. 1992) (substantive due process).

because Plaintiff has not obtained a final decision regarding her ability to use the Property as a deli. The Court agrees. The Second Circuit has held that the finality prong of the Williamson test "conditions federal review on a property owner submitting at least one meaningful application for a variance." Murphy, 402 F.3d at 348 (collecting cases); see also Goldfine v. Kelly, 80 F. Supp. 2d 153, 159 (S.D.N.Y. 2000) (In the land use context, "[i]n order to have a final decision, 'a development plan must be submitted, considered, and rejected by the governmental entity.' Even where the plaintiff applies for approval of a subdivision plan and is rejected, a claim is not ripe until the plaintiff also seeks variances that would allow it to develop the property." (quoting Unity Ventures v. Lake Cnty., 841 F.2d 770, 774 (2d Cir. 1988)).

Here, Plaintiff never requested a variance to operate a deli on the Property,[4] and she does not dispute that. Rather, Plaintiff argues that Judge Santorelli's decision dismissing the Town's prosecution of Plaintiff (Defs. Exs. HH & II) satisfies the "final decision" prong of Williamson. (Pl. Opp. 21 (stating

[4] The Court notes that Plaintiff did submit two applications for variances to subdivide the Property into two lots and to build single-family homes on each, which were denied by the ZBA. (Defs. 56.1 Stmt. ¶¶ 78-79, 86, 88.) However Plaintiff is not challenging the ZBA's denial of her requests to subdivide the Property; rather, she is challenging Defendants' alleged revocation of the 2004 CO allowing for the operation of a deli. (Pl. Opp. 20.) As such, these variance applications are irrelevant to this ripeness analysis.

that the Moving Defendants "misapprehend[] the nature of this action which is premised upon the malicious prosecution of Zito without any basis in law or fact").) This argument is misguided at best and evinces a deep misunderstanding of the finality requirement. First, "a claim of malicious prosecution may not be brought as a substantive due process claim." Singer v. Fulton Cnty. Sheriff, 63 F.3d 110, 115 (2d Cir. 1995) (citing Albright v. Oliver, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994)); cf. Graham v. City of N.Y., --- F. Supp. 2d ----, 2012 WL 2154257, at *15 (E.D.N.Y. June 14, 2012) ("No claim for malicious prosecution [under § 1983] lies where the plaintiff was 'never taken into custody, imprisoned, physically detained or seized within the traditional meaning of the Fourth Amendment.'" (quoting Washington v. Cnty. of Rockland, 373 F.3d 310, 316 (2d Cir. 2004))). Second, any procedural due process claims arising out of the Town's prosecution of Plaintiff necessarily fail because, not only was she given notice and an opportunity to be heard, she actually succeeded on the merits and had the claims dismissed. (Defs. Exs. HH & II.) And finally, not any decision of the Town will satisfy the finality requirement. To be considered a "final decision," the decision must be "from the entity charged with implementing the zoning regulations," Murphy, 402 F.3d at 348, and must take a "definitive position on the issue that inflicts an actual,

concrete injury," Williamson, 473 U.S. at 193. Here, Judge Santorelli's decision does not address the purported revocation of the 2004 CO; thus, it "does not conclusively determine whether [Plaintiff] will be denied all reasonable beneficial use of [the] [P]roperty, and therefore is not a final, reviewable decision." Id. at 194.

Accordingly, as Plaintiff failed to seek a variance related to her use of the Property as a deli, her due process claims are not ripe for adjudication.[5] Therefore, the Court grants summary judgment in favor of the Moving Defendants and dismisses Plaintiff's due process claims as unripe.

D. Malicious Prosecution and Abuse of Process Claims

"In general, where the federal claims are dismissed before trial, the state claims should be dismissed as well." Marcus v. AT&T Corp., 138 F.3d 46, 57 (2d Cir. 1998). "Although this is not a mandatory rule, the Supreme Court has stated that 'in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendant jurisdiction doctrine--judicial economy, convenience, fairness and comity--will point toward declining

[5] While the Court recognizes that there is a futility exception to the final decision requirement, see, e.g., Homefront Org. v. Motz, 570 F. Supp. 2d 398, 407 (E.D.N.Y. 2008), there is no evidence in the record to support the application of that exception here.

jurisdiction over the remaining state-law claims.'" In re Merrill Lynch Ltd. P'ship Litig., 154 F.3d 56, 61 (2d Cir. 1998).

In the present case, "[w]hile discovery has been completed and the instant case has proceeded to the summary judgment stage, it does not appear that any discovery would need to be repeated if [P]laintiff['s] pendant claims were brought in state court." Tishman v. The Associated Press, No. 05-CV-4278, 2007 WL 4145556, at *9 (S.D.N.Y. Nov. 19, 2007); accord Levine v. Smithtown Cent. Sch. Dist., 565 F. Supp. 2d 407, 428 (E.D.N.Y. 2008). Further, since N.Y. C.P.L.R. 205 allows a plaintiff to recommence a dismissed suit within six months of its termination without regard to the statute of limitations, see, e.g., Trinidad v. N.Y.C. Dep't of Corr., 423 F. Supp. 2d 151, 169 (S.D.N.Y. 2006); Tishman, 2007 WL 4145556, at *9; Levine, 565 F. Supp. 2d at 428, Plaintiff will not be unduly prejudiced by the dismissal of her state law malicious prosecution and abuse of process claims.

Accordingly, the Court declines to extend supplemental jurisdiction over those claims and dismisses them without prejudice.

II. John Doe and Jane Doe Defendants

All that remains are Plaintiff's claims against the John and Jane Doe defendants. However, as discovery has closed

and Plaintiff has yet to identify or serve these unknown defendants, the Court sua sponte dismisses Plaintiff's claims against them without prejudice. See, e.g., Blake v. Race, 487 F. Supp. 2d 187, 192 n.1 (E.D.N.Y. 2007) (sua sponte dismissing claims against John Doe defendants because plaintiff "failed to identify any of the unnamed defendants, or to present any evidence demonstrating their involvement in the infringing activity," prior to the close of discovery); De La Rosa v. N.Y.C. 33 Precinct, No. 07-CV-7577, 2010 WL 4965482, at *6 (S.D.N.Y. Nov. 23, 2010) (sua sponte dismissing claims against John Doe defendants for failure to timely serve process); Delrosario v. City of N.Y., No. 07–CV–2027, 2010 WL 882990, at *5 (S.D.N.Y. Mar. 4, 2010) (sua sponte dismissing claims against John Doe defendants for failure to prosecute "[w]here discovery has closed and the Plaintiff has had ample time and opportunity to identify and serve John Doe Defendants").

CONCLUSION

For the foregoing reasons, the Moving Defendants' motion for summary judgment is GRANTED, and all claims against the Moving Defendants are DISMISSED. Further, the Court sua sponte dismisses all remaining claims against the John and Jane Doe defendants.

Accordingly, the Clerk of the Court is directed to mark this matter closed.

SO ORDERED.

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: June 28, 2012
Central Islip, NY