USCA11 Case: 23-11732 Document: 40-1 Date Filed: 03/28/2024

In the United States Court of Appeals For the Eleventh Circuit

---

No. 23-11732
Non-Argument Calendar

ROBERT M. ROGERS,
Plaintiff-Appellant,
versus
JACKSON COUNTY FLORIDA,
A Florida County and Political Subdivision of the State of Florida,
JAMES D. PEACOCK,
Individually and in His Capacity as County Commissioner,
Defendants-Appellees.

Opinion of the Court 23-11732
Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 5:22-cv-00237-TKW-MJF

Before WILSON, LUCK, and ANDERSON, Circuit Judges.

PER CURIAM:

Robert Rogers, *pro se*, appeals the district court's dismissal of his complaint against Jackson County, Florida, and one of its County Commissioners, James

Peacock. He argues that the County and Peacock unconstitutionally deprived him of property without due process of law and that Peacock violated his equal protection rights because Peacock partially destroyed an earthwork berm on Rogers's property[4]

I. DISCUSSION

We review a district court's order granting a motion to dismiss *de novo*, accepting all facts in the complaint as true and drawing all reasonable inferences in favor of the plaintiff. *Randall v. Scott*, 610 F.3d 701, 705 (11th Cir. 2010). We write only for the parties who are already familiar with the relevant facts. Therefore, we set out only such facts as are necessary for the parties to understand our rulings.

A. Procedural Due Process Claim

A plaintiff bringing a procedural due process claim must show that he was (1) deprived of a constitutional property interest (2) by state action (3) through a constitutionally inadequate process. *Spencer v. Benison*, 5 F.4th 1222, 1232 (11th Cir. 2021); *see* U.S. Const. amend. XIV, § 1. An "unauthorized intentional deprivation of property by a state employee"—as opposed to an established state procedure designed to deprive property—does not violate the Due Process

---

[4] Rogers also moves for leave to amend his pleadings, stating that newly discovered evidence would "add credence" to his testimony and refute Peacock's testimony. Because Rogers's motion presents no new legal arguments and merely seeks to introduce new evidence not relevant to resolution of the constitutional issues on appeal, we deny his motion as moot. The district court dismissed state law claims against all of the Defendants, declining to exercise supplemental jurisdiction of the state law claims after dismissal of the federal claims.

Clause if a meaningful post-deprivation remedy is available. *Hudson v. Palmer*, 468 U.S. 517, 533 (1984); *see Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga.*, 633 F.3d 1297, 1317-18 (11th Cir. 2011). Under Florida law, a county's board of commissioners has the power to maintain the county's property collectively, not the individual commissioners. *Kirkland v. State*, 97 So. 502, 508 (Fla. 1923); *see also* Fla. Stat. § 125.01. A district court can consider the exhibits attached to a complaint when ruling on a motion to dismiss. *Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231 (11th Cir. 2000).

Here, Rogers has not stated a procedural due process claim. His complaint does not allege facts which would show that the deprivation of property was through a constitutionally inadequate process. *See Spencer*, 5 F.4th at 1232. Rogers's complaint repeatedly characterizes Peacock's actions as being unauthorized, and state law shows that Peacock does not possess the power to unilaterally act on the County's behalf. *See Kirkland*, 97 So. at 508. Peacock's alleged unauthorized intentional deprivation of Rogers' property does not require pre-deprivation remedies if a meaningful postdeprivation remedy is available. *Hudson*, 468 U.S. at 533. A meaningful post-deprivation remedy does exist, as shown by Rogers's state-law claims for trespass and nuisance against the County, thus satisfying the Due Process Clause. *Id.* Finally, the district court did not convert the motions to dismiss to summary judgment motions by considering exhibits attached to the complaint. *See Grossman*, 225 F.3d at 1231. Accordingly, we affirm as to this issue.

B. Equal Protection Claim Against Peacock

A "class of one" claim under the Equal Protection Clause requires a plaintiff to show that he has been intentionally treated differently from other similarly situated people and that the government lacked a rational basis for the different treatment. *Chabad Chayil, Inc. v. Sch. Bd. of Miami-Dade Cnty.*, 48 F.4th 1222, 1233 (11th Cir. 2022); *see* U.S. Const. amend. XIV, § 1. The comparator must be similarly situated in all relevant respects. *Chabad Chayil*, 48 F.4th at 1233.

Though *pro se* briefs are construed liberally, *pro se* litigants abandon issues not briefed on appeal. *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008). An issue is not briefed on appeal when it is not specifically and clearly identified by a party in its opening brief. *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir. 2004). For an issue to be adequately briefed, it must be plainly and prominently raised and must be supported by arguments and citations to the evidence and to relevant authority. *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 6 81 (11th Cir.2014).

Here, even construing Rogers's *pro se* brief liberally, he has abandoned his equal protection claim. While his opening brief mentions the issue, he does not address the district court's reasons for granting the motion to dismiss on the claim and does not cite to relevant authority on the issue. *See Sapuppo*, 739 F.3d at 681.

Even assuming that the issue were not abandoned, Rogers's complaint does not state a "class of one" equal

protection claim. *See Chabad Chayil*, 48 F.4th at 1233. Rogers has identified no similarly situated comparators. The presence of the berm on Rogers's land meant that he was not similarly situated to his neighbor, Colby Willoughby. Thus, the district court correctly held that there was a rational basis for Peacock to treat Rogers's land differently from Willoughby's. *See id.* Therefore, the district court did not err in dismissing the equal protection claim.

AFFIRMED

This page intentionally left blank

Case 5:22-cv-00237-TKW-MJF Document 47 Filed 04/26/23

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

ROBERT M. ROGERS,
Plaintiff,

v. **Case No. 5:22cv237-TKW-MJF**

JACKSON COUNTY, et al.,
Defendants.
_____/

ORDER DISMISSING FEDERAL CLAIMS AND DECLINING JURISDICTION OVER STATE LAW CLAIMS

This case is before the Court based on the motions to dismiss filed by Defendants James Peacock (Doc. 39) and Jackson County (Doc. 41) (collectively "the County Defendants"). Upon due consideration of the motions, Plaintiff's responses in opposition (Docs. 42, 44), and the second amended complaint (Doc. 34), the Court finds that the motions are due to be granted.

I. Facts

Plaintiff owns real property in Jackson County, Florida. Plaintiff's property abuts a dirt road known as Garrett Road, which serves as the dividing line between Plaintiff's property and property leased by Defendant Colby Willoughby[5].

[5] As alleged in the second amended complaint

In 2014, Mr. Willoughby reconfigured a portion of his property abutting Garrett Road, adding a road access point and eliminating a watershed area, which caused water runoff from his property to flow across Garrett Road onto Plaintiff's property. In 2018, the County compounded the runoff problem by re-grading the road to create a declining slope from the Willoughby property to Plaintiff's property.

A storm in January 2019 flooded Plaintiff's property with road construction material and other runoff from the Willoughby property and Garret Road. The County's efforts to rebuild Garrett Road following the storm only increased the runoff flow onto Plaintiff's property.

In July 2019, Plaintiff sent a letter to the Superintendent of the Jackson County Road and Bridge Department complaining that the County's inept maintenance of Garrett Road was damaging his property. Plaintiff received no response to that letter. Frustrated by the County's unresponsiveness, Plaintiff constructed an earthworks berm on his side of Garett Road to prevent runoff from entering his property. The berm was completed in August 2019.

Four months later, on December 30, 2019, Jackson County Commissioner James Peacock received a 6:00 a.m. phone call from a local resident complaining that four feet of water had accumulated on Garrett Road. Commissioner Peacock immediately went to Garrett Road, and by the time he arrived around 7:00 a.m., the water had receded down to two or three feet.

Around 11:00 a.m., Commissioner Peacock and one or more County employees returned to Garrett Road and used a backhoe to open a hole in Plaintiff's berm, allowing water to drain from the road onto his property. Commissioner Peacock briefly spoke with Plaintiff on the phone during the work on the berm but did not give him prior notice or seek his authorization to open it.

Commissioner Peacock claims that the water accumulation on Garrett Road on December 30 made the road dangerously impassable, and his decisive action was justified to quell the emergency situation. However, the county did not declare a state of emergency and Plaintiff's security camera captured footage of a vehicle successfully traversing Garett Road at 8:52 a.m. that day, over two hours before Commissioner Peacock opened the berm.

On at least one other occasion since December 30, 2019, Commissioner Peacock removed a portion of the berm on Plaintiff's property without Plaintiff's authorization. Additionally, as recently as December 2022, a county employee cut vegetation on the berm without authorization.

II. Procedural History

In January 2020, Plaintiff filed suit against the County Defendants in state court, alleging state law claims for trespass and nuisance in connection with Commissioner Peacock's destruction of the berm. *See Rogers v. Jackson County*,

Fla. 14th Jud. Cir. Case No. 2020-CA-21.[6] There were no substantive rulings in the state court case[7],3 and in October 2022, Plaintiff voluntarily dismissed that case and filed a complaint against the County Defendants in this Court.

The original complaint filed in this Court asserted the same state law claims that Plaintiff asserted in the state court and added several federal claims. The County Defendants responded to the complaint with motions to dismiss, which were denied as moot after Plaintiff filed an amended complaint as a matter of course under Fed. R. Civ. P. 15(a)(1)(B). *See* Doc. 23. The County Defendants responded to the amended complaint with motions to dismiss, which were denied as moot after Plaintiff was granted leave to file a second amended complaint under Fed. R. Civ. P. 15(a)(2). *See* Doc. 36.

---

[6] A transcript of a hearing held in the state court case was attached to the second amended complaint, *see* Doc. 34-4, and the Court can take judicial notice of the docket in that case, *see Paez v. Sec'y, Fla. Dep't of Corrections*, 947 F.3d 649, 652 (11th Cir. 2020).

[7] The state court docket reflects that a hearing was held on Plaintiff's emergency motion for temporary injunctive relief in June 2020, but the docket does not include an order ruling on that motion. Moreover, although it appears that the parties engaged in some discovery during 2020 and 2021, the pleadings were never closed because, in September 2021, the state court granted the County's motion to dismiss the amended complaint and authorized Plaintiff to file a second amended complaint. There was no substantive record activity in the state court case from that point forward.

The second amended complaint, filed in March 2023, alleges procedural due process claims against the County (Count I) and Commissioner Peacock (Count II) under 42 U.S.C. §1983, an equal protection claim against Commissioner Peacock

Page 5
under §1983 (Count III), and state law claims against the County (Counts IV and V) and Mr. Willoughby (Counts VI and VII). The County Defendants responded to the second amended complaint with motions to dismiss the federal claims[8] under Fed. R. Civ. P. 12(b)(6)[9] Mr. Willoughby did not respond to the second amended complaint, and a Clerk's default was entered against him under Fed. R. Civ. P. 55 (a). *See* Doc. 46. The County Defendants' motions to dismiss are fully briefed and ripe for rulings. No hearing is necessary to rule on the motions.

III. Standard of Review

When reviewing a motion to dismiss under Rule 12(b)(6), the Court must accept the well-pled facts in the operative pleading (here, the second amended complaint) as true and view them in the light most favorable to the non-moving party. *St. Joseph's Hosp., Inc. v. Hosp. Corp. of Am.*, 795 F.2d 948, 954 (11th Cir.

---

[8] The County answered the state law claims, denying the substantive allegations against it and asserting various affirmative defenses. *See* Doc. 40.

[9] Commissioner Peacock's motion also sought dismissal under Fed. R. Civ. P. 12(b)(1) for lack of subject-matter jurisdiction, but the extent of the jurisdictional argument in the motion is that "Plaintiff has not established subject matter jurisdiction ... because the claims cannot state a cause of action." Doc. 39 at 3-4.

1986). To survive such a motion, the operative pleading "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v.*

Page 6

Twombly, 550 U.S. 544, 570 (2007)). The plausibility standard is satisfied "when the [non-moving party] pleads factual content that allows the court to draw the reasonable inference that the [moving party] is liable for the misconduct alleged." *Id.* This standard "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully harmed-me accusation." *Id.* (quoting *Twombly*, 550 U.S. at 555).

IV. Analysis

The County Defendants argue that the federal claims against them should be dismissed for failure to state a claim because (1) as to the procedural due process claims, Plaintiff has adequate post-deprivation remedies under state law, and (2) as to the equal protection claim, Plaintiff has not identified a similarly situated comparator who was treated differently. The Court agrees with both arguments[10].

A. Procedural Due Process

---

[10] Because the Court finds these arguments dispositive, the Court need not consider the County's argument that Plaintiff has not pled a valid claim for municipal liability under *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978), or Commissioner Peacock's argument that he is entitled to qualified immunity.

To state a procedural due process claim, a plaintiff must allege: "(1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process." *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003). The County Defendants do not dispute that the second

Page 7
amended complaint plausibly alleges the first two elements, but they argue that Plaintiff has not alleged that he has been denied constitutionally adequate process.

The Due Process Clause in the Fourteenth Amendment requires, "at a minimum, ... notice and the opportunity to be heard incident to deprivation of life, liberty or property at the hands of the government." *Id.* The notice and opportunity to be heard must be provided "at a meaningful time and in a meaningful manner," which typically requires that the plaintiff receive notice and a hearing before the deprivation takes place. *Id.* (internal quotation marks omitted) (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972)); *accord Zinermon v. Burch*, 494 U.S. 113, 132 (1990). However, "due process does not require pre-deprivation hearings where the holding of such a hearing would be impracticable." *Nat'l Ass'n of Bds. of Pharmacy v. Board of Regents of the Univ. Sys. of Ga.*, 633 F.3d 1297, 1317 (11th Cir. 2011) (cleaned up).

Where pre-deprivation process is "impracticable," the state can satisfy due process by providing "a meaningful postdeprivation remedy for

the loss." *See Hudson v. Palmer*, 468 U.S. 517, 533 (1984). Here, meaningful post-deprivation remedies are available for the destruction of Plaintiff's berm in the form of state law tort claims—such as the trespass and nuisance claims that Plaintiff initially pursued in state court and that he now pleads against the County in the second amended complaint. *See Carcamo v. Miami-Dade Cnty.*, 375 F.3d 1104, 1106 (11th Cir.

Page 8
2004) (holding that "a judicial post-deprivation cause of action" can satisfy due process in circumstances where pre-deprivation process is not required).

The Court did not overlook Plaintiff's conclusory allegation that "Florida provides no adequate state court remedies" for the alleged due process violation in this case, Doc. 34 at ¶ 65, but that allegation is belied by the tort claims pled against the County later in the second amended complaint. Thus, the Court need not accept that allegation as true. *See Lakoskey v. Floro*, 2021 WL 5860460, *4 (11th Cir. 2021) (rejecting argument that plaintiff lacked adequate post-deprivation remedies where complaint pled state tort claims); *see also Griffin Indus., Inc., v. Irvin*, 496 F.3d 1189, 1205-06 (11th Cir. 2007) ("[The Court's] duty to accept the facts in the complaint as true does not require [it] to ignore specific factual details of the pleading in favor of general or conclusory allegations.").

Apart from citing that conclusory allegation, Plaintiff makes no argument about the inadequacy of his post-deprivation remedies under state tort law. Thus, given that adequate post-deprivation remedies

exist, the viability of Plaintiff's due process claims boils down to "whether this is one of those situations where the existence of a post-deprivation remedy is sufficient ... or whether ... pre-deprivation notice was feasible and required." *Hoefling v. City of Miami*, 811 F.3d 1271, 1283 (11th Cir. 2016); *see also Zinermon*, 494 U.S. at 132 ("In situations where the State feasibly can provide a pre-deprivation hearing before taking property, it generally

Page 9
must do so regardless of the adequacy of a post-deprivation tort remedy to compensate for the taking.").

Generally, "where a loss of property is occasioned by a random, unauthorized act by a state employee," pre-deprivation process is not required "because 'the state cannot know when such deprivations will occur.'" *Nat'l Ass'n of Bds. of Pharmacy*, 633 F.3d at 1317 (quoting *Hudson*, 468 U.S. at 532-33). By contrast, where the deprivation occurred pursuant to "an established state procedure which has as its purpose the deprivation of a protected interest," *id.* (emphasis removed), predeprivation process is "ordinarily feasible" and therefore required. *Rittenhouse v. DeKalb Cnty.*, 764 F.2d 1451, 1455 (11th Cir. 1985). "The controlling inquiry is solely whether the state is in a position to provide for pre-deprivation process." *Hudson*, 468 U.S. at 534.

Here, the County Defendants argue that the destruction of Plaintiff's berm was essentially "a random, unauthorized act by" Commissioner Peacock such that predeprivation process was not feasible.

Plaintiff responds that pre-deprivation notice and hearing was practicable and should have been provided. The Court finds that this case is closer to the "random, unauthorized act" category of cases than the "established state procedure" category of cases, such that pre-deprivation process was not feasible or practicable under the facts alleged in the second amended complaint.

Page 10

Under Florida law, the Board of County Commissioners may only act as a whole, and the actions of individual commissioners, without Board approval, does not bind the county. *See Kirkland v. State*, 97 So. 502, 508 (Fla. 1923). Thus, absent Board approval, Commissioner Peacock's actions could not be considered "authorized."

Plaintiff's original complaint in this Court specifically alleged that Commissioner Peacock's destruction of the berm was "without approval and a vote by the Board." Doc. 1, ¶45. That allegation was omitted from the second amended complaint, but even without that allegation, the second amended complaint cannot be reasonably read to allege that Commissioner Peacock's destruction of the berm was authorized by the Board—particularly since it alleges that he used his "apparent authority as a commissioner to commandeer County property and employees to destroy private property," Doc. 34 at ¶53 (emphasis added); that he "regularly directed County workers to perform County work ... without Board approval," *id.* at ¶61 (emphasis added); and that "the County's failure to take any action to cease Mr. Peacock's unauthorized actions amounted to the

County's tacit approval of Mr. Peacock's unauthorized acts," *id.* at ¶62 (emphasis added); *see also* Doc. 34-4 at 24 (transcript attached to the second amended complaint, which reflects that Commissioner Peacock testified at a state court hearing that he "did not have any formal authorization" from the Board when he opened a hole in Plaintiff's berm on December 30, 2019). Accordingly, because Commissioner Peacock's destruction of the berm

Page 11
was unauthorized, pre-deprivation process was impracticable.

The Court did not overlook Plaintiff's allegations that the County had a "custom or policy" of acquiescing to Commissioner Peacock's unauthorized use of County equipment, which amounted to "tacit approval" of his actions. However, those allegations fail to establish that pre-deprivation process was feasible or practicable for two reasons.

First, even if the County regularly failed to police Commissioner Peacock's unauthorized use of County equipment, there is no allegation that the Board had prior notice of each specific instance of unauthorized use. If the County could not predict when Commissioner Peacock would use County equipment to effect property deprivations, it could not possibly provide notice and a hearing before those deprivations, even if they were "tacitly authorized" in some sense. *See Hudson*, 468 U.S. at 532 (acknowledging that state cannot provide pre-deprivation process if it "cannot predict when the loss will occur."). The fact that Commissioner Peacock

could anticipate his own actions, is immaterial. *Id.* at 534 ("Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is solely whether the state is in a position to provide for predeprivation process.") (emphasis added).

Page 12

Second, the conduct that the County is alleged to have acquiesced to is "Mr. Peacock regularly direct[ing] County workers to preform County work, including maintenance, construction or other activities without Board approval"—none of which necessarily involve a deprivation of property. For an established state procedure to require pre-deprivation notice, the procedure itself must be "designed to deprive people of property interests." *Nat'l Ass'n of Bds. of Pharmacy*, 633 F.3d at 1317. Thus, even if the County's policy of acquiescing to Commissioner Peacock's unauthorized use of county equipment facilitated his destruction of the berm, that is not enough to establish that the policy was "designed to deprive people of property" such that pre-deprivation process was required.

The Court also did not overlook Plaintiff's argument that, even if predeprivation process was impracticable for the initial destruction of the berm on December 30, 2019, it would have been practicable for the other property invasions months later. But again, there is no allegation that anyone on the Board other than Commissioner Peacock (or the Board as a whole) had any prior notice of these actions such that it could have feasibly provided pre-deprivation process.

Finally, the Court did not overlook Plaintiff's argument that a County ordinance establishes a pre-deprivation process attendant to property deprivations, and the existence of that codified process means that pre-deprivation remedies were "available" in this case. *See* Jackson Cnty. Code §2-1. However, the mere existence

Page 13

of a pre-deprivation process does not mean that it was practicable in any given situation. *See Carcamo*, 375 F.3d at 1105 n. 4 ("[T]he acceptability of postdeprivation process turns on the feasibility of pre-deprivation process, not the existence of a policy or practice"). And, as discussed above, the County's lack of prior notice of each instance that Commissioner Peacock went onto Plaintiff's property to perform work on the berm made providing the process established in the County ordinance impracticable.

In sum, the impracticability of pre-deprivation process makes this "one of those situations where the existence of a post-deprivation remedy is sufficient" to satisfy the Due Process Clause. *Hoefling*, 811 F.3d at 1283. Accordingly, it follows that the second amended complaint fails to state a plausible procedural due process claim against either of the County Defendants.

B. Equal Protection

Plaintiff's equal protection claim is a "class of one" claim because he "alleges not that [he] belongs to a protected class, but that [he] is the only entity being treated differently from all other similarly situated

entities." *Chabad Chayil, Inc., v. School Bd. of Miami-Dade Cnty.*, 48 F.4th 1222, 1233 (11th Cir. 2022). To state such a claim, Plaintiff must plausibly allege that he "[1] has been intentionally treated differently from others similarly situated and [2] that there is no rational basis for

Page 14
the difference in treatment." *Id.* (internal quotation marks omitted) (quoting *PBT Real Est., LLC v. Town of Palm Beach*, 988 F.3d 1274, 1285 (11th Cir. 2021)).

Courts "apply the similarly situated requirement with rigor," requiring that "[t]he entities being compared must be *prima facie* identical in all relevant respects." *Id.* (cleaned up); *see also id.* ("A plaintiff must ultimately show that it and any comparators are similarly situated in light of all the factors that would be relevant to an objectively reasonable governmental decisionmaker" (cleaned up)). The purpose of the similarly situated requirement is to maintain the focus of equal protection claims on true discrimination and "to avoid constitutionalizing every state regulatory dispute." *Griffin Indus., Inc.*, 496 F.3d at 1207.

Here, Plaintiff argues that he is similarly situated to Mr. Willoughby and that Commissioner Peacock discriminated against him by destroying his (instead of Mr. Willoughby's) property to alleviate flooding on Garrett Road. Commissioner Peacock argues that Plaintiff and Mr. Willoughby are not "*prima facie* identical in all relevant respects." The Court agrees with Commissioner Peacock.

The second amended complaint alleges a glaring difference between Plaintiff's property and Mr. Willoughby's: Plaintiff's property contains a roadside berm, whereas Mr. Willoughby's property does not. When Commissioner Peacock sought to quickly alleviate flooding on Garrett Road, Plaintiff's property presented an effective option that Mr. Willoughby's did not—open the berm that was trapping

Page 15

water on the road.[11] The Court expresses no opinion on whether that was the correct option, or even a legal one under state law, but the fact that the action taken on Plaintiff's property was one that Commissioner Peacock could not have possibly taken on Mr. Willoughby's property undermines any notion that the two properties were similarly situated. Moreover, even if the berm itself did not make the properties dissimilar, it still represented a rational basis for Commissioner Peacock to treat the two properties differently. *See Griffin Indus., Inc.*, 496 F.3d at 1207-08 (noting that plaintiff must plead both "similarly situated" and "no rational basis" elements to survive motion to dismiss).

The Court did not overlook Plaintiff's argument that his equal protection claim should not be held to a

---

[11] The Court did not overlook Plaintiff's allegations that the County created the water accumulation problem in the first place by negligently re-grading Garrett Road. Doc. 34 at ¶¶ 31, 33. However, the alleged equal protection violation is based on "Mr. Peacock intentionally enter[ing] onto [Plaintiff's property] and destroy[ing] Plaintiff's berm to allegedly mitigate flooding," not the road grading. *Id.* at ¶89.

heightened pleading standard. *See* Doc. 42 at 6. However, the Eleventh Circuit applies the similarly situated requirement "with rigor" even at the motion to dismiss stage, and it has routinely affirmed the dismissal of complaints that fail to substantiate the factual similarities between the plaintiff and alleged comparator. *See, e.g., Chabad Chayil, Inc.*, 48 F. 4th at 1234; *Griffin Indus., Inc.*, 496 F.3d at 1207; *Kessler v. City of Key West*, 2022 WL 590892, *4 (11th Cir. 2022); *Watkins v. Central Broward Regional Park*, 799 F. App'x 659, 664

Page 16
(11th Cir. 2020). Like those cases, "[Plaintiff]'s own complaint shows that it was not similarly situated to [Mr. Willoughby] in light of all the factors that would be relevant to an objectively reasonable governmental decisionmaker." *Griffin Indus., Inc.*, 496 F.3d at 1207. Accordingly, the second amended complaint fails to state a plausible equal protection claim.

* * *

In sum, despite his best efforts to make a federal case out of Commissioner Peacock's unauthorized destruction of his berm, Plaintiff has not stated a plausible federal claim against either of the County Defendants. That, then, requires the Court to determine (1) whether those claims should be dismissed with or without prejudice and (2) whether to retain jurisdiction over the state law claims.

On the first issue, the Court concludes that the federal claims should be dismissed with prejudice because Plaintiff did not request leave to further amend those claims if the Court found the arguments

in the County Defendants' motions to dismiss persuasive; he has already amended his complaint twice; and the problem is not that the second amended complaint lacks sufficient detail, but rather it is that the detail included substantively undermines the claims. *See Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002) (en banc) ("A district court is not required to grant a plaintiff leave to amend his complaint sua sponte when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested

Page 17

leave to amend before the district court."); *Florida TeePee, LLC v. Walton Cnty., Fla.*, 2022 WL 19573772, *3 (N.D. Fla. Dec. 16, 2022) (dismissing federal claim with prejudice where "any amendment of this claim would be futile because ... the problem here is not that Plaintiffs did not allege enough, but rather they alleged too much and pled themselves out of a claim"). Thus, the federal claims will be dismissed with prejudice.

On the second issue, because this Court's jurisdiction was based on the federal claims rather than diversity of citizenship,[12] there is no reason for the Court to retain jurisdiction over the remaining state law claims and interests of comity support the dismissal of those claims. *See* 28 U.S.C. §1367(c)(3) (authorizing the district court to decline to exercise supplemental jurisdiction over state law claims where "the district court has dismissed all clams over which

[12] Plaintiff and the County Defendants are all citizens of Florida. *See* Doc. 34 at ¶¶2

it has original jurisdiction"); *Harris-Billups on behalf of Harris v. Anderson*, 61 F.4th 1298, 1305-06 (11th Cir. 2023) (reiterating that the Eleventh Circuit has encouraged district courts to dismiss any remaining state claims when the federal claims on which the court's jurisdiction was based are dismissed before trial) (citing *Raney v. Allstate Ins.*, 370 F.3d 1086, 1088-89 (11th Cir. 2004)). Thus, the state law claims will be dismissed without prejudice so Plaintiff can (re)file them in the state court.

Page 18

Accordingly, for the reasons stated above, it is **ORDERED** that:

1. Commissioner Peacock's motion to dismiss (Doc. 39) is **GRANTED**, and the federal claims against him in Counts II and III of the second amended complaint are **DISMISSED with prejudice**.

2. The County's motion to dismiss (Doc. 41) is **GRANTED**, and the federal claim against it in Count I of the second amended complaint is **DISMISSED with prejudice**.

3. The Court declines to exercise supplemental jurisdiction over the state law claims in Counts IV, V, VI, and VII of the second amended complaint, and those claims are **DISMISSED without prejudice**.

4. The Clerk shall enter judgment in accordance with this Order and close the case file.

DONE and ORDERED this **26th day of April, 2023**.

/s/ T. KENT WETHERELL, II
UNITED STATES DISTRICT JUDGE

USCA11 Case: 23-11732 Document: 47-2 Date Filed: 07/09/2024

In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-11732

ROBERT M. ROGERS,
Plaintiff-Appellant,
versus
JACKSON COUNTY FLORIDA,
A Florida County and Political Subdivision of the State of Florida,
JAMES D. PEACOCK,
Individually and in His Capacity as County Commissioner,
Defendants-Appellees,
COLBY B. WILLOUGHBY,
Defendant.

USCA11 Case: 23-11732 Document: 44-2 Date Filed: 05/08/2024 Page: 1 of 2

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 5:22-cv-00237-TKW-MJF

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before WILSON, LUCK, and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. FRAP 35, IOP 2.

USCA11

Additional material from this filing is available in the Clerk's Office.