IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, vs. TOWN OF COLORADO CITY, ARIZONA; CITY OF HILDALE, UTAH; TWIN CITY POWER; and TWIN CITY WATER AUTHORITY, INC., Defendants.	)	No. 3:12-cv-8123-HRH (Prescott Division)

O R D E R

Motion to Dismiss

The Hildale defendants move to dismiss plaintiff's Fair Housing Act claims for damages and civil penalties.[1] Defendant Town of Colorado City joins in this motion.[2] The motion is opposed.[3] Oral argument was requested and has been heard.

Background

Plaintiff is the United States of America. Defendants are the Town of Colorado City, Arizona; City of Hildale, Utah; Twin City Power; and Twin City Water Authority, Inc.

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[1]Docket No. 61.

[2]Docket No. 62.

[3]Docket No. 65.

Plaintiff commenced this action on June 21, 2012. Plaintiff alleges that the Town of Colorado City and the City of Hildale are adjoining communities "populated primarily by members of the" Fundamentalist Church of Jesus Christ of the Latter-day Saints (FLDS) and that although non-FLDS individuals live in the cities, "they are a distinct minority."[4] In its second cause of action, plaintiff alleges that defendants have violated the Fair Housing Act, 42 U.S.C. §§ 3601-19, by engaging in a pattern and practice of denying fair housing to non-FLDS residents of the defendant cities. More specifically, plaintiff alleges that defendants have denied or delayed water and electrical service and denied building permits to non-FLDS individuals "since approximately 2008[.]"[5] Plaintiff also alleges that "[p]rior to July 2009," defendants delayed or denied electrical connections to non-FLDS individuals and that "[s]ince July 2009," defendants have delayed providing information to the cities' current electrical provider, which has resulted in a delay of service for non-FLDS individuals and entities.[6] Plaintiff seeks injunctive relief, damages, and civil penalties for defendants' alleged violations of the Fair Housing Act. Defendants now move to dismiss plaintiff's Fair Housing Act claims for damages and civil

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[4]Complaint at 4, ¶ 10, Docket No. 1.

[5]Id. at 12, ¶ 36.

[6]Id. at 31, ¶ 41.

penalties, arguing that these claims are barred by the statute of limitations.[7]

Discussion

When as here, a defendant has answered, a Rule 12 motion to dismiss is treated as a Rule 12(c) motion for judgment on the pleadings. Lyon v. Chase Bank USA, N.A., 656 F.3d 877, 883 (9th Cir. 2011). "Rule 12(b)(6) and Rule 12(c) motions are functionally equivalent[.]" Harris v. County of Orange, 682 F.3d 1126, 1131 (9th Cir. 2012). "'A motion to dismiss based on the running of the statute of limitations period may be granted only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove the statute was tolled.'" Centaur Classic Convertible Arbitrage Fund Ltd. v. Countrywide Financial Corp., 878 F. Supp. 2d 1009, 1014 (C.D. Cal. 2011) (quoting Supermail Cargo, Inc. v. United States, 68 F.3d 1204, 1206-07 (9th Cir. 1995)). "Although, as a general rule, a district court may not consider materials not originally included in the pleadings in deciding a Rule 12 motion, it 'may take judicial notice of matters of public record' and consider them without converting a Rule 12 motion into one for summary judgment.'" United States v. 14.02 Acres of Land More or Less in Fresno County, 547 F.3d 943, 955 (9th

[7]There is no statute of limitations for Fair Housing Act claims seeking equitable relief. Garcia v. Brockway, 526 F.3d 456, 460 (9th Cir. 2008).

Cir. 2008) (quoting Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001)).

Plaintiff's claim for damages under the Fair Housing Act is subject to the general three-year statute of limitations found in 28 U.S.C. § 2415(b). Garcia, 526 F.3d at 460. Section 2415(b) provides:

> Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort[8] shall be barred unless the complaint is filed within three years after the right of action first accrues[.]

28 U.S.C. § 2415(b). "'A claim normally accrues ... when the factual and legal prerequisites for filing suit are in place.'" United States v. Taigen & Sons, Inc., 303 F. Supp. 2d 1129, 1143 (D. Idaho 2003) (quoting 3M Co. v. Browner, 17 F.3d 1453, 1460 (D.C. Cir. 1994)).

Because plaintiff has alleged that defendants were denying or unreasonably delaying utilities and denying building permits to non-FLDS individuals and entities since 2008, defendants argue that it is clear from the face of plaintiff's complaint that plaintiff was aware of the alleged pattern and practice of housing discrimination more than three years before it filed its complaint in June 2012.

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[8]A Fair Housing Act claim is "in the nature of a tort claim[.]" United States v. Marsten Apartments, Inc., 175 F.R.D. 257, 263 (E.D. Mich. 1997).

This argument fails, however, because plaintiff's allegations do not indicate when plaintiff became aware of the alleged pattern and practice of housing violations. Plaintiff alleges that the pattern and practice of housing discrimination had begun as early as 2008. The critical date here is not when the alleged pattern and practice began, but rather, the date on which plaintiff became aware of the pattern and practice. Section 3614(a) of Title 42 of the United States Code, which governs Fair Housing Act pattern and practice claims, provides that

> [w]henever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States district court.

This statute is unambiguous. It provides that a pattern and practice claim accrues when the Attorney General[9] has reasonable cause to believe that someone is engaging in a pattern and practice of housing discrimination.[10] Contrary to defendants' contention,

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[9]The Attorney General has delegated the authority to file pattern and practice claims to the Assistant Attorney General for the Civil Rights Division of the United States. 28 C.F.R. § 0.50.

[10]Because a Fair Housing Act pattern and practice claim accrues when the Assistant Attorney General for the Civil Rights Division has reasonable cause to believe that someone was engaging in a pattern or practice of housing discrimination, there is no need to (continued...)

the face of plaintiff's complaint does not indicate that plaintiff had reasonable cause to believe that defendants were allegedly engaged in a pattern and practice of housing discrimination more than three years before it filed the complaint in this matter.

The information that defendants submit about three of the aggrieved persons[11] also does not indicate that plaintiff had reasonable cause to believe that defendants were engaged in a pattern and practice of housing discrimination more than three years before plaintiff filed its complaint. Defendants submit a copy of a court decision in UEP Trust v. Ross Chatwin, Case No. CV-2004-83,[12] which was a forcible entry and detainer action and a copy of what is purported to be a news article dated April 24, 2005 in which Ross Chatwin claimed that his utilities had been shut off by the Cities.[13] Defendants also submit a copy of what is purported to be a news article dated July 26, 2005, regarding allegations that Andrew Chatwin was cited for trespassing when he attempted to move into a

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[10](...continued)
consider plaintiff's continuing violation and discovery rule arguments.

[11]If plaintiff prevails on its Fair Housing Act pattern and practice claim, the court may award "monetary damages to persons aggrieved[.]" 42 U.S.C. § 3614(d)(1)(b).

[12]Exhibit A, Hildale Defendants' Motion to Dismiss Plaintiff's Claims for Damages and Civil Penalties, Docket No. 61.

[13]Exhibit B, Hildale Defendants' Motion to Dismiss Plaintiff's Claims for Damages and Civil Penalties, Docket No. 61.

house that he claimed had been built by his father.[14] Defendants also submit a copy of the docket sheet of the § 1983 case Andrew Chatwin filed against Marshal's Officers and Hildale City in 2006.[15] Finally, defendants offer an excerpt of the deposition of John Cook that was taken in Cooke v. Hildale-Colorado City Utilities, Case No. 3:10-cv-08105-JAT, in which he testified that he was denied a building permit in May 2007 and that he communicated with a representative of the Arizona Attorney General's office about the matter, but he could not remember exactly when, other than it was between May 2007 and October 2010.[16]

This evidence[17] says nothing about when plaintiff became aware of the alleged pattern and practice of housing discrimination. The running of the statute of limitations for plaintiff's pattern and practice claim is not based on when the alleged victims were discriminated against. It is based on when plaintiff had reasonable

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[14]Exhibit C, Hildale Defendants' Motion to Dismiss Plaintiff's Claims for Damages and Civil Penalties, Docket No. 61.

[15]Exhibit D, Hildale Defendants' Motion to Dismiss Plaintiff's Claims for Damages and Civil Penalties, Docket No. 61.

[16]Exhibit E, Hildale Defendants' Motion to Dismiss Plaintiff's Claims for Damages and Civil Penalties, Docket No. 61.

[17]The court can take judicial notice of official court documents and of the existence of the newspaper articles and the allegations contained therein. See Hurd v. Garcia, 454 F. Supp. 2d 1032, 1055 (S.D. Cal. 2006) (taking judicial notice of court records); Rivas v. Fischer, 687 F.3d 514, 520 n.4 (2d Cir. 2012)(taking judicial notice of the fact that media coverage contained certain information but not accepting the truth of the information contained therein).

cause to believe that defendants were engaged in a pattern and practice of housing discrimination. At this point, that date is unknown[18] and thus defendants' motion to dismiss plaintiff's claim for damages under the Fair Housing Act is denied.

As for plaintiff's claim for civil penalties under the Fair Housing Act, that claim is subject to the five-year statute of limitations found in 28 U.S.C. § 2462. Section 2462 provides:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued....

28 U.S.C. § 2462.

As discussed above, defendants contend that at least three of the violations on which plaintiff's pattern and practice claim is based accrued over five years before plaintiff filed its complaint. But as also explained above, the accrual of plaintiff's pattern and practice claim is not based on when the alleged victims were discriminated against; it is based on when plaintiff had reasonable cause to believe that defendants were engaged in a pattern and practice of housing discrimination, a date which is presently

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[18]At oral argument, counsel represented that plaintiff is contending that it first became aware of the alleged pattern and practice of housing discrimination on April 7, 2010. However, as defense counsel pointed out, discovery in this case has just begun and whether plaintiff will be able to prove this contention is not yet known.

unknown. Defendants' motion to dismiss plaintiff's claim for civil penalties under the Fair Housing Act is denied.

Conclusion

Defendants' motion to dismiss[19] is denied. Defendants are not precluded from raising a statute of limitations defense at a later date should they discover that plaintiff was aware of the alleged pattern and practice of housing discrimination outside of the applicable statute of limitations periods.

DATED at Anchorage, Alaska, this 6th day of June, 2013.

/s/ H. Russel Holland
United States District Judge

[19]Docket No. 61.