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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GHP MANAGEMENT CORPORATION, Plaintiff, v. CITY OF LOS ANGELES, Defendant.	Case No. CV 21-06311 DDP (JEMx) **ORDER GRANTING MOTIONS TO DISMISS** [Dkt 17, 43]

Presently before the court are two Motions to Dismiss Plaintiffs' Complaint, one filed by Defendant City of Los Angeles ("the City") and the other filed by Intervenors Alliance for Community Empowerment ("ACCE"); Strategic Actions for a Just Economy ("SAJE"); and Coalition for Economic Survival ("CES") (collectively, "Intervenors"). Having considered the submissions of the parties, the court grants the motions and adopts the following Order.

I. Background

At the outset of the COVID-19 pandemic, the City enacted Ordinance No. 186585, which was later updated by Ordinance No. 186606 (collectively, the "Eviction Moratorium" or "Moratorium"). Plaintiffs allege that the Eviction Moratorium "effectively

precludes residential evictions." (Complaint ¶ 45.) The Moratorium prohibits landlords from terminating tenancies due to COVID-related nonpayment of rent, any no-fault reason, certain lease violations related to additional occupants and pets, or removal of rental units from the rental market. (Complaint ¶ 46; LAMC § 49.99.2, 49.99.4.)[1] Landlords are also prohibited from charging interest or late fees on COVID-related missed rent. (LAMC § 49.99.2(D).) The Moratorium further allows tenants who have missed rent payments a one-year period to pay delayed rent, starting from the end of the ongoing local emergency period. (Compl. ¶ 46; LAMC § 49.99.2) Tenants may sue landlords and seek civil penalties for violations of the Moratorium. (Compl. ¶ 49; LAMC § 49.99.7.)

Plaintiffs, comprised of (1) thirteen limited liability corporations or limited partnerships that own apartment buildings and (2) the management company that manages the buildings, own or manage nearly five thousand apartment units in Los Angeles. Plaintiffs allege that the Moratorium constitutes an uncompensated taking of private property in violation of the Fifth Amendment's Takings Clause, as well as the California Constitution's Takings Clause. Plaintiffs' Complaint seeks an award of "just compensation," costs, and attorney's fees, but does not seek to invalidate or enjoin enforcement of the Moratorium.

Intervenors and the City now move separately to dismiss Plaintiffs' Complaint.

[1] The City's Request for Judicial Notice is granted.

II. Legal Standard

A complaint will survive a motion to dismiss when it "contain[s] 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. Twombly, 550 U.S. 544, 570 (2007)). When considering a Rule 12(b)(6) motion, a court must "accept as true all allegations of material fact and must construe those facts in the light most favorable to the plaintiff." Resnick v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000). Although a complaint need not include "detailed factual allegations," it must offer "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Iqbal, 556 U.S. at 678. Conclusory allegations or allegations that are no more than a statement of a legal conclusion "are not entitled to the assumption of truth." Id. at 679. In other words, a pleading that merely offers "labels and conclusions," a "formulaic recitation of the elements," or "naked assertions" will not be sufficient to state a claim upon which relief can be granted. Id. at 678 (citations and internal quotation marks omitted).

"When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief." Iqbal, 556 U.S. at 679. Plaintiffs must allege "plausible grounds to infer" that their claims rise "above the speculative level." Twombly, 550 U.S. at 555-56. "Determining whether a complaint states a plausible claim for relief" is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Iqbal, 556 U.S. at 679.

III. Discussion

A. Per Se Taking

Movants contend that the Moratorium is not a permanent physical invasion of Plaintiffs' properties, and therefore does not constitute a per se taking. (E.g., City Mot. at 15.) See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440 (1982) ("We affirm the traditional rule that a permanent physical occupation of property is a taking.") In Loretto itself, the Supreme Court recognized "that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails[,] . . . [s]o long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party." Id. Later, in Yee v. City of Escondido, Cal., 503 U.S. 519 (1992), the Court held that a combination of rent control laws and eviction protections that limited property owners' ability to evict tenants did not constitute governmental authorization of "a compelled physical invasion of property" that would constitute a per se taking. Yee, 503 U.S. at 527-28.

In Yee, a local rent control ordinance limited a mobile home park owners' ability to raise rents, while a state law simultaneously protected mobile home owners' ability to transfer mobile homes sited on rented mobile home park land. Id. at 524-25. The park owners alleged that the rent control scheme, against the backdrop of the state law, constituted a physical taking of park land, insofar as it granted tenants and their successors "the right to physically permanently occupy and use the real property of

Plaintiff." Id. at 525. The Court disagreed. "When a landowner decides to rent his land to tenants, the government may place ceilings on the rents the landowner can charge, or require the landowner to accept tenants he does not like, without automatically having to pay compensation." Id. at 529 (internal citations omitted). "Petitioners' tenants were invited by petitioners, not forced upon them by the government. . . . A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." Id. at 528.

In response to Movants' arguments that Yee controls here, Plaintiffs argue primarily that Yee is no longer good law because "six members of the Supreme Court obviously disagree" with its central premise: that once a landlord chooses to rent to tenants, the government may regulate the landlord-tenant relationship without automatically engaging in a per se taking. (Opp. to City Mot. at 18:17.) To support their assertion, Plaintiffs point to the Supreme Court's recent decisions in Alabama Ass'n of Realtors v. Department of Health & Human Services, 141 S. Ct. 2485 (2021), and Pakdel v. City & Cty. of San Francisco, 141 S. Ct. 2226 (2021). These cases bear only tangentially however, if at all, on the continued validity of Yee. In Alabama Association of Realtors, the Supreme Court granted an emergency application to vacate a stay of a judgment invalidating the Centers for Disease Control and Prevention ("CDC")'s eviction moratorium. Alabama Ass'n of Realtors, 141 S.Ct. at 2486, 2490. The Court did not address any takings issue anywhere in its opinion. Although the Court did, citing Loretto, recognize that the right to exclude is

"one of the most fundamental elements of property ownership," Yee acknowledged the very same principle. Id.; Yee, 503 U.S. at 528 ("[T]he right to exclude is doubtless . . . one of the most essential sticks in the bundle of rights that are commonly characterized as property . . . ."") (internal quotation marks omitted).

Pakdel did involve a takings claim, albeit a regulatory takings claim rather than a per se claim. Pakdel, 141 S.Ct. at 2228. The Court's opinion, however, was limited to the question whether petitioners were required to exhaust local government administrative procedures before filing suit pursuant to 42 U.S.C. § 1983, even after the local government had rendered a final regulatory decision. Id. In the course of answering that question in the negative, the Court stated in a footnote that "[o]n remand, the Ninth Circuit may give further consideration to [merits] claims in light of our recent decision in Cedar Point Nursery v. Hassid."[2] Id. at 2229 n.1 (citation omitted). In Cedar Point, the Court concluded that a California law requiring farmers to grant union organizers access to private property for up to three hours per day, 120 days per year, constituted a per se physical taking. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2069, 2080 (2021). Although the Court did cite Yee, it did so only once, and then only as an example of a decision that has "described use restrictions that go 'too far' as 'regulatory takings.'" Id. at 2072. The Court then observed that the "regulatory takings" label can be misleading where, as in Cedar Point, "a regulation results in a physical

[2] The district court in Pakdel did not reach the merits of the takings claims. Pakdel, 141 S.Ct. at 2228-29.

appropriation of property." Id. The Court made no further mention of Yee, let alone the principle that a regulation governing an existing landlord-tenant relationship is distinguishable from a regulation compelling physical occupation in the first instance, or in perpetuity. Thus, contrary to Plaintiffs' suggestion, the Court's footnote in Pakdel, indicating that the Ninth Circuit remains free to consider Cedar Point if and when the Ninth Circuit, on remand, reaches merits issues that were never reached by the district court, does little to vitiate Yee.[3]

This Court declines Plaintiffs' invitation to read the tea leaves, such as they are, in Alabama Association of Realtors, Pakdel, and Cedar Point. None of those cases can be read to abrogate Yee or its prescription that laws that "merely regulate [landlords'] *use* of their land by regulating the relationship between landlord and tenant" do not constitute per se takings. Yee, 503 U.S. at 528 (emphasis original).

Plaintiffs also argue, briefly, that the Moratorium constitutes a per se taking even under Yee because it "*requires*

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[3] This Court acknowledges that in Heights Apartments, LLC v. Walz, the Eighth Circuit found Yee distinguishable and applied Cedar Point to sustain a per se takings challenge to an eviction moratorium. Heights Apartments, 30 F.4th 720, 733 (8th Cir. 2022). That has not, however, been the Ninth Circuit's approach. In Ballinger v. City of Oakland, for example, the Ninth Circuit addressed a takings challenge to an ordinance requiring payments to tenants prior to an eviction, even for good cause. Ballinger, 24 F.4th 1287, 1292 (9th Cir. 2022), cert. denied sub nom. Ballinger v. City of Oakland, California, 142 S. Ct. 2777 (2022). Citing to both Cedar Point and Yee, the court applied the latter, concluding that even a regulation mandating payments from landlords to tenants constituted a regulation of the use of property, and not a per se taking, such as those described in Yee, compelling the creation of a new landlord-tenant relationship or barring the termination of a tenancy "in perpetuity." Id. at 1293-94 (quoting Yee, 503 U.S. at 528).

the landowner to submit to the physical occupation of his land. 'This element of required acquiescence is at the heart of the concept of occupation.'" (Opp. to Intervenors' Mot. at 3:23-28.) Yee, 503 U.S. at 527 (quoting FCC v. Florida Power Corp., 480 U.S. 245, 252 (1987) (emphasis original)). But, as in Yee, the Moratorium does not swoop in out of the blue to force Plaintiffs to submit to a novel use of their property. Nor does the Moratorium present the type of different case, contemplated by Yee, where a regulation compels a landowner to "refrain in perpetuity from terminating a tenancy." Id. at 528. The Moratorium only precludes evictions for a limited, albeit indeterminate, time. Compare id. (discussing Cal.Civ.Code § 798.56(g) requirement of up to 12 months notice prior to eviction). "Put bluntly, no government has required any physical invasion of petitioners' property. [The] tenants were invited by [the landlords], not forced upon them by the government." Yee, 503 U.S. at 528; see also Ballinger, 24 F.4th at 1293 (No per se taking, even where regulation required payment by landlord to tenants prior to eviction for good cause, because landlord plaintiffs "voluntarily chose to lease their property . . . ."). A regulation affecting that pre-existing relationship is not a per se taking.

B. Regulatory taking

"[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). "[C]ompensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the

regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." Yee, 503 U.S. at 522-23 (citing Penn Central Transportation Co. v. New York City, 438 U.S. 104, 123-125 (1978)). The relevant Penn Central factors "include the regulation's economic impact on the claimant, the extent to which the regulation interferes with distinct investment-backed expectations, and the character of the government action." MHC Fin. Ltd. P'ship v. City of San Rafael, 714 F.3d 1118, 1127 (9th Cir. 2013).

1. Economic Impact

The Ninth Circuit discussed the Penn Central factors, including the economic impact factor, at length in Colony Cove Properties, LLC v. City of Carson, 888 F.3d 445 (9th Cir. 2018). As the court explained, "[n]ot every diminution in property value caused by a government regulation rises to the level of an unconstitutional taking." Colony Cove, 888 F.3d at 451. Similarly, "the mere loss of some income because of regulation does not itself establish a taking." Id. Rather, courts look to whether a regulation is "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."[4] Id. (quoting Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005)). Accordingly, the threshold is high. Indeed, the Ninth Circuit has observed that a diminution in property value as high as 92.5% does not constitute a taking, and no court has found a taking where the diminution of value does not exceed 50%. Id.

[4] This same fundamental inquiry underpins analyses of per se takings. See Lingle, 544 U.S. 538-39.

To determine a diminution in value for purpose of evaluating the economic impact on a plaintiff, courts "compare the value that has been taken from the property with the value that remains in the property." Colony Cove, 888 F.3d at 451 (quoting Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987)). Here, however, Plaintiffs' Complaint does not allege any particular diminution in value, or specific pre- or post-Moratorium values from which a level of diminution could be calculated.

Plaintiffs assert that this pleading deficiency is not fatal, and that they need not allege any quantitative facts pertaining to valuation, because the Ninth Circuit's Colony Cove opinion is wrong. (Opp. to Intervenors' Mot. at 6:1-4, 7 n.4.) Plaintiffs contend that because the Penn Central factor analysis is "essentially ad hoc," the allegation that Plaintiffs have lost rents as a result of the Moratorium is alone sufficient to satisfy the economic impact factor. See Penn Central, 438 U.S. at 124.

Even if this Court were to agree with the substance of Plaintiffs' arguments, the court could not simply disregard Colony Cove and excuse Plaintiffs of their burden to allege and show the requisite adverse economic impact. "A district court bound by circuit authority . . . has no choice but to follow it, even if convinced that such authority was wrongly decided." Hart v. Massanari, 266 F.3d 1155, 1175 (9th Cir. 2001). Plaintiffs' allegation that their tenants are $20 million in arrears is presented in a vacuum, and cannot alone demonstrate a significant economic impact, notwithstanding Plaintiffs' vague and conclusory allegation that "the economic impact of the Eviction Moratorium is severe and ruinous." (Compl. ¶ 71.)

2. Interference with investment-backed expectations

The next Penn Central factor is "the extent to which the regulation has interfered with distinct investment-backed expectations." Penn Central, 438 U.S. at 124. "To 'expect' can mean to anticipate or look forward to, but it can also mean 'to consider probable or certain,' and 'distinct' means capable of being easily perceived, or characterized by individualizing qualities." Guggenheim v. City of Goleta, 638 F.3d 1111, 1120 (9th Cir. 2010) (en banc). "To form the basis for a taking claim, a purported distinct investment-backed expectation must be objectively reasonable." Colony Cove, 888 F.3d at 452; see also Connolly v. Pension Ben. Guar. Corp., 475 U.S. 211, 226 (1986). "[W]hat is relevant and important in judging reasonable expectations is the regulatory environment at the time of the acquisition of the property." Bridge Aina Le'a, LLC v. Land Use Comm'n, 950 F.3d 610, 634 (9th Cir. 2020) (internal quotation marks and citation omitted). "[T]hose who do business in [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." Concrete Pipe & Prod. of California, Inc. v. Constr. Laborers Pension Tr. for S. California, 508 U.S. 602, 645 (1993) (quoting FHA v. The Darlington, Inc., 358 U.S. 84, 91 (1958)) (internal alterations omitted).

Movants argue that Plaintiffs knowingly chose to invest in the highly-regulated rental housing market, and that any subjective expectations Plaintiffs may have had that the regulatory environment would remain static were and are objectively unreasonable. The City raised, and this Court rejected, a similar

argument in the context of a Contracts Clause challenge to the same Moratorium at issue here. See Apartment Ass'n of Los Angeles Cnty., Inc. v. City of Los Angeles, 500 F. Supp. 3d 1088, 1095 (C.D. Cal. 2020), aff'd, 10 F.4th 905 (9th Cir. 2021), cert. denied, 212 L. Ed. 2d 595, 142 S. Ct. 1699 (2022). Had Plaintiffs acquired their rental properties in the midst of the pandemic, Movants' argument might be more compelling. The regulatory environment existing prior to the pandemic, however, gave Plaintiffs little reason to expect that they might be barred from evicting tenants for nonpayment of rent. Bridge Aina Le'a, 950 F.3d at 634. "'Distinct investment-backed expectations' implies reasonable probability, like expecting rent to be paid, not starry eyed hope of winning the jackpot if the law changes. A landlord buys land burdened by lease-holds in order to acquire a stream of income from rents and the possibility of increased rents or resale value in the future." Guggenheim, 638 F.3d at 1120 (emphases added). As this Court has stated, "the scope and nature of the COVID-19 pandemic, and of the public health measures necessary to combat it, have no precedent in the modern era, and [] no amount of prior regulation could have led landlords to expect anything like the blanket Moratorium." Apartment Ass'n of Los Angeles, 500 F.Supp. 3d at 1096; see also Baptiste v. Kennealy, 490 F. Supp. 3d 353, 390 (D. Mass. 2020). The extent to which the Moratorium interferes with Plaintiffs' reasonable expectations thus weighs in favor of a regulatory taking.

3. Character of the Moratorium

"A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by

government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." Penn Central, 438 U.S. at 124. For example, rent control ordinances intended to shield residents from "excessive rent increases," have been found to constitute "precisely such a program." Colony Cove, 888 F.3d at 454. Here, there can be little doubt the Moratorium is geared toward promoting the common good. Indeed, the Moratorium is predicated on the City's findings that "[t]he COVID-19 pandemic threatens to undermine housing security and generate unnecessary displacement of City residents." (LAMC § 49.99.) There can be little dispute that, absent the Moratorium's protections, significant numbers of tenants with COVID-related loss of income would have been evicted, resulting not only in the harms typical of mass displacements, but exacerbating the spread of COVID-19 as well, to the detriment of all. Other courts, addressing similar regulations, have reached the same conclusion. See, e.g., Baptiste, 490 F. Supp. At 390 (D. Mass. 2020); S. California Rental Hous. Ass'n v. Cty. of San Diego, No. 3:21CV912-L-DEB, 2021 WL 3171919, at *9 (S.D. Cal. July 26, 2021).

With respect to the "character" factor, Plaintiffs largely reiterate their argument, rejected above, that the Moratorium is a per se taking. Beyond that, Plaintiffs contend in a footnote that, although rent control schemes may qualify as sufficiently public-oriented, the Moratorium "is far different and significantly more serious." (Opp. to Intervenors' Mot. at 9 n.5.) Plaintiffs do not, however, explain how a regulation intended to minimize the displacement of financially vulnerable tenants in the midst and as a result of a public health emergency unprecedented in modern

history is less protective of the common good than are rent control ordinances. As to seriousness, it is not clear to the court what bearing the "seriousness" of the Moratorium has on the public nature of its purpose. To the extent Plaintiffs intend to emphasize the shifting of financial burdens from tenants to landlords, the Ninth Circuit has recognized that commonplace regulations, including rent control, zoning schemes, and other land use restrictions, "can also be said to transfer wealth from the one who is regulated to another." Yee, 503 U.S. at 529. And, to the extent Plaintiffs use the word "serious" to refer to the degree of the Moratorium's financial effects, they have failed, as discussed above, to plead any facts establishing a "serious" economic impact.

4. Balance of Penn Central factors

Plaintiffs have adequately alleged that the Moratorium has interfered with the reasonable, investment-backed expectations Plaintiffs had when they acquired their rental properties. The Complaint does not, however, allege any diminution in value, let alone a diminution high enough to function as the equivalent of a classic taking. Because the Moratorium also indisputably promotes the common good, the balance of the Penn Central factors weighs heavily against a determination that the Moratorium constitutes a regulatory taking.

IV. Conclusion

For the reasons stated above, the motions to dismiss are GRANTED.[5] Plaintiffs' Complaint is DISMISSED, with leave to amend.

[5] Having determined that Plaintiffs' Complaint fails to allege either a per se or regulatory taking, the court does not reach the City's arguments that any takings claims are unripe, or that (continued...)

Any amended complaint shall be filed within twenty-one days of the date of this Order.

IT IS SO ORDERED.

Dated: November 17, 2022

DEAN D. PREGERSON
United States District Judge

[5](...continued)
Plaintiffs lack standing to assert any such claims.