

CAUSE NO. D-1-GN-16-002620

AHMAD ZAATARI, MARWA	§	IN THE DISTRICT COURT
ZAATARI, JENNIFER GIBSON	§	
HEBERT, JOSEPH "MIKE" HEBERT,	§	
LINDSAY REDWINE, RAS REDWINE	§	
VI, AND TIM KLITCH,	§	
Plaintiffs,	§	
&		
STATE OF TEXAS,	§	TRAVIS COUNTY, TEXAS
Intervenor,	§	
v.		
CITY OF AUSTIN, TEXAS AND	§	
STEVE ADLER, MAYOR	§	
OF THE CITY OF AUSTIN,	§	
Defendants.	§	53 rd JUDICIAL DISTRICT

CITY'S NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF THE DISTRICT COURT:

The City of Austin, Texas and its Mayor Steve Adler (together, "City") file this No-Evidence Motion for Summary Judgment pursuant to Texas Rules of Civil Procedure, Rule 166(a)(i), concerning all claims asserted by Plaintiffs and Intervenor:

I. SUMMARY

1. Plaintiffs and Intervenor (together, "Plaintiffs") cannot produce any evidence to show that the City's 2016 ordinance regulating short-term rental properties has violated any plaintiff's constitutional rights. Although Plaintiffs raise many policy objections to the City's regulations, and although they cite numerous Texas Constitution provisions as part of their suit—including protections against invasion of privacy, unreasonable search and seizure, retroactive laws, and takings without just compensation, as well as guarantees of free assembly, due course of law, and equal protection—they do not identify any direct constitutional injuries, and cannot do

so. Adequate time for discovery has passed. *See* TEX. R. CIV. PROC. 166a(i). Accordingly, the City hereby seeks summary judgment on the grounds of no evidence.

II. NO-EVIDENCE SUMMARY JUDGMENT

2. To succeed on a no-evidence motion for summary judgment, the defendant must allege that, after adequate time for discovery, there is no evidence of an essential element of the plaintiff's cause of action. TEX. R. CIV. PROC. 166a(i); *see Fort Brown Villas III Condo. Ass'n v. Gillenwater*, 285 S.W.3d 879, 882 (Tex. 2009). If the defendant meets its burden, the burden shifts to the plaintiff to produce more than a scintilla of evidence to raise a genuine issue of material fact regarding the challenged element. TEX. R. CIV. PROC. 166a(i); *see Forbes, Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 172 (Tex. 2003). The evidence must be sufficient to allow reasonable and fair-minded people to differ in their conclusions on whether the challenged fact exists; evidence that raises only a speculation or surmise is insufficient. *Forbes*, 124 S.W.3d at 172. If less than a scintilla of evidence is produced, the defendant is entitled to a summary judgment on the plaintiff's cause of action.

3. Here, Plaintiffs have had adequate time for discovery. In fact, at the urging of Plaintiffs, the District Court issued a scheduling order that mandated that the City file all dispositive motions by October 20, 2017.¹

4. The City is entitled to a no-evidence summary judgment on all of Plaintiffs' claims, for several reasons.

¹ *See Plaintiffs Response to Defendant's Motion to Compel Discovery* at 9-10 (filed Sept. 18, 2017) (arguing that discovery is complete); *see also Order Granting in Part and Denying in Part Plaintiffs' and Texas's Motion for a Protective Order and City of Austin's Motion to Enter Scheduling Order and Motion to Compel Discovery Responses of Plaintiffs* (entered Sept. 29, 2017) (setting dispositive motion filing deadline of Oct. 20, 2017).

5. Plaintiffs cannot establish standing. *See Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001). Specifically, Plaintiffs cannot establish three required elements: (1) a personal injury; (2) that is fairly traceable to the defendant's allegedly unlawful conduct; and (3) that is likely to be redressed by the requested relief. *See id.*

6. Plaintiffs cannot establish that their claims are ripe. *See Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851-52 (Tex. 2000) (plaintiff must show that his claimed injury is "direct and immediate, rather than conjectural, hypothetical or remote").

7. Plaintiffs cannot establish a waiver of the City's governmental immunity. *See Tex. Dept. of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004) (plaintiff must produce specific evidence of a *prima facie* claim to support a waiver of immunity).

8. In regard to their right of privacy claims, Plaintiffs cannot establish any unreasonable intrusion against their home or person. *See Tex. State Employees Union v. Texas Dept. of Mental Health and Mental Retardation*, 746 S.W.2d 203, 205 (Tex. 1987) (citing TEX. CONST., art. 1, §§ 9, 25).

9. In regard to their free assembly claims, Plaintiffs cannot establish any specific instance in which they have been denied the right to "assemble together for the common good." *See* TEX. CONST., art. 1, § 27.

10. In regard to their due course of law and equal protection claims, Plaintiffs cannot establish any economic injury. *See Patel v. Tex. Dept. of Licensing & Reg.*, 469 S.W.3d 69, 87 (Tex. 2015) (plaintiff must establish that a state law imposes an economic burden on the challenging party that "is so burdensome as to be oppressive" in light of the government's interest); *see also Town of Sunnyvale v. Mayhew*, 905 S.W.2d 234, 244-45 (Tex.App.—Dallas 1994), *rev'd*

on other grounds, 964 S.W.2d 922 (Tex. 1998) (legal standard for equal protection claim is virtually identical to due course of law claim).

11. In regard to their takings claim, Plaintiffs cannot establish a deprivation of property.

See Sheffield Dev. Co., Inc. v. City of Glen Heights, 140 S.W.3d 660, 671-72 (Tex. 2004) (an unconstitutional taking may occur if the government physically appropriates property, if the government adopts a regulation that “denies all economically beneficial or productive use of land,” or if the government’s regulations go “too far” and become akin to a physical taking for which the constitution requires compensation).

12. In regard to their retroactivity claim, Plaintiffs cannot establish any impairment of a legitimate entitlement. *See Robinson v. Crown Cork & Seal*, 335 S.W.3d 126, 144 (Tex. 2010).

13. Finally, Plaintiffs cannot establish any irreparable injury to vested property rights. *Consumer Service Alliance of Texas, Inc. v. City of Dallas*, 433 S.W.3d 796, 802-803, 805 (Tex.App.—Dallas 2014, no pet.) (discussing requirements to establish exception to general rule that civil courts may not determine the validity of a penal ordinance).

III. PRAYER

The City requests that the Court grant its no-evidence motion for summary judgment as to all of Plaintiffs’ claims.

RESPECTFULLY SUBMITTED,

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ATTORNEYS FOR DEFENDANTS

NOTICE OF HEARING

The City hereby gives notice that it has set hearing on this no-evidence motion for summary judgment for November 13, 2017, at 9:00 a.m., in the Travis County District Court, 1000 Guadalupe, Austin, Texas 78701, for a period of three hours, to run concurrently with hearing on all pending dispositive motions.

/s/ Michael Siegel
MICHAEL SIEGEL

CERTIFICATE OF CONFERENCE

I certify that the City's hearing was set in compliance with the scheduling order issued by Judge Gisela Triana on September 29, 2017, and that all parties to this controversy have notice of the day, time, and duration of the hearing on the parties' respective dispositive motions.

/s/ Michael Siegel
MICHAEL SIEGEL

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing on all parties, or their attorneys of record, in compliance with the Texas Rules of Civil Procedure, this 20th day of October, 2017.

Via e-service to:

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