IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

LAURA L. UNDERWOOD,

Plaintiff,

v.

1450 SE Orient, LLC dba KALEAFA, et al,

Defendants.

3:18-cv-1366-JR

FINDINGS & RECOMMENDATION

RUSSO, Magistrate Judge:

Plaintiff Laura Underwood originally brought this action against 226 defendants alleging violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962 related to marijuana production on a farm adjacent to her property. Plaintiff grouped defendants into the following categories: (1) defendants who purchased the neighboring farm, "Candy Farm Property," in order to produce marijuana and marijuana products on that property; (2) defendants who cultivated marijuana for the Candy Farm Property on properties other than the Candy Farm Property; and (3) defendants who sold marijuana products produced by the Candy Farm Property at their retail outlets.

Plaintiff filed her first amended complaint on October 15, 2018. (ECF #127). On March 18, 2019, the Court severed the retail defendants from this action. (ECF #377). On April 16, 2019, plaintiff filed a RICO case statement. (ECF #397). On April 29, 2019, defendants moved to dismiss the First Amended Complaint. (ECF #412). On June 14, 2019, this Court issued a Findings and Recommendation recommending dismissal, which was adopted in full on July 3, 2019. (ECF #486, #491). Plaintiff was allowed 60 days to file a second amended complaint.

Defendants 7Points Inc., Robert Marion Elam, Michael R. Munzing, Joel Matthew Fischer, Aaron Howard, Mason Reed Walker, East Fork Agriculture LLC, Nathan Cole Howard, Joseph River Perkins, Darlene Siegel, David Alan Kline, Willamette Valley Resources LLC, Jason Reynolds, Steven Penman, Sugar Tree Farm, LLC, Certified Portland LLC, and Adam Raymond Kirkwood, High Noon Farm LLC, Tyson J. Lewis, and Gregory Neale Perrin now move to dismiss plaintiff's second amended complaint. (ECF #528). Defendants Evette Pavich, Nicholas Pavich, and N&A Investments, LLC joined in the motion to dismiss and raised an additional ground for dismissal. (ECF #533). The Court held oral argument on February 20, 2020. For the reasons stated below, defendants' motions to dismiss should be denied.

ALLEGATIONS

Plaintiff is an Oregon property owner who lives immediately adjacent to the former Oregon Candy Farm located at 48620 SE Highway 26 in Sandy, Oregon (Candy Farm Property). Second Amended Complaint at ¶ 1 (ECF #500). Defendants Alexander Pavich, Evette Pavich and Nicholas Pavich own and control defendant N&A (the Pavich Defendants). Plaintiff alleges that in August 2013, defendant N&A acquired the Candy Farm Property for the purposes of cultivating marijuana, manufacturing concentrated marijuana extracts, and producing marijuana-infused products to sell. Plaintiff alleges these activities constitute a criminal enterprise (the Marijuana Operation). Plaintiff

further alleges each of the Pavich defendants agreed to make a financial investment in the Marijuana Operation, and in exchange, each of them would receive a portion of the Marijuana Operation proceeds. Id. at ¶¶ 51-52.

Plaintiff alleges the Pavich defendants and defendant Aligra Marie Rainy developed the Candy Farm Property beginning in September 2013 in preparation for the Marijuana Operation. Id. at ¶¶ 53-55. Plaintiff further alleges the Pavich defendants formed other companies such as defendant Chronic Creations, LLC and defendant Oregon Candy Farm, LLC to manufacture marijuana products and market and sell those products. Id. at e.g., ¶¶ 56-57. Plaintiff alleges other defendants such as defendant 7Points, Inc. also joined in the Marijuana Operation to produce marijuana for Chronic Creations and defendant Oregon Candy Farm, LLC. Id. at e.g., ¶¶ 63-64.

Plaintiff alleges all defendants engaged in the production and sale of a controlled substance in violation of the Controlled Substances Act. 21 U.S.C. §§ 812, 823, 841, 844. Plaintiff further alleges violation of the Controlled Substances Act and other criminal statutes through advertisements of marijuana products, facilitation of financial transactions, and reinvestments of proceeds from marijuana sales. 21 U.S.C. §§ 843, 854; 18 U.S.C. §§ 1956, 1957. Second Amended Complaint at ¶ 89 (ECF #500). Plaintiff alleges defendants' violation of the Controlled Substances Act and money laundering constitutes a conspiracy to engage in a pattern of racketeering activity. Id. at ¶¶ 93-121. Accordingly, plaintiff asserts all defendants violated RICO by conspiring to conduct the affairs of the Marijuana Operation. Id. at ¶¶ 124-27. Plaintiff alleges defendants specifically violated 18 U.S.C. § 1962(c) (use of an enterprise to conduct a pattern of racketeering activity) and 18 U.S.C. § 1962(d) (conspiracy to conduct such an activity).

Plaintiff alleges defendants' violation of RICO "directly and proximately injured [her] Property by diminishing its market value and making it more difficult to sell." Second Amended

Complaint at ¶ 129 (ECF #500); see also ¶¶ 87-88 (describing in detail the impact on plaintiff's property). In addition, plaintiff alleges:

> On or about April 2019, Plaintiff decided to sell Plaintiff's Property and began advertising it for sale. Plaintiff has continuously and publicly advertised Plaintiff's Property for sale since such time. Plaintiff's Property is attractive and well maintained, and the advertisements for it feature appealing photographs and a full description of the property's many attributes. However, prospective purchasers can easily access public records on the Internet evidencing the marijuana-related uses of the adjacent Candy Farm Property. Furthermore, the pungent smell of marijuana is often quite evident on Plaintiff's Property, particularly on warm days. Since on or about April 2019, Plaintiff has materially reduced the asking price for Plaintiff's Property several times. The current asking price for Plaintiff's Property is materially less than the sale prices of comparable properties not located next door to marijuana operations. To date, Plaintiff has received no offers to purchase Plaintiff's Property at any price, despite the strong local real estate market.

Second Amended Complaint at ¶ 88 (ECF #500).

DISCUSSION

Defendants assert the complaint must be dismissed because plaintiff has not and cannot allege an injury sufficient to state a RICO claim.

A civil RICO action allows "[a]ny person injured in his business or property by reason of a violation of" the RICO statute to bring a civil suit for treble damages. 18 U.S.C. §1964(c). To demonstrate RICO standing, a plaintiff must allege that she suffered an injury to her business or property as a proximate result of the alleged racketeering activity. Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992). Thus, among other elements, in order to state a RICO cause of action, plaintiff must allege harm to a specific business or property interest cognizable under state law. Newcal Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1055 (9th Cir. 2008). Moreover, the harm must result in concrete financial loss and not mere injury to a valuable intangible property interest. Chaset v. Fleer/Skybox Int'l, 300 F.3d 1083, 1087 (9th Cir. 2002).

As noted above, plaintiff alleges only that she suffered injury to the value of her property, such that, she is unable to sell her property. Defendants assert four grounds to dismiss plaintiff's

complaint: (1) plaintiff's allegations do not amount to a concrete financial loss; (2) plaintiff's injury is not recognized as a property injury under Oregon state law; (3) judicially noticeable records show that plaintiff's allegations are not plausible; and (4) plaintiff has not pled a direct causal relationship between the RICO violations and plaintiff's harms.

A. Concrete Financial Loss

Defendants argue "[a]lthough [plaintiff] states that she 'decided to sell' her property and that she has failed to do so to date, she does not identify any quantifiable harm caused by defendants' conduct." Defendants' Motion to Dismiss Second Amended Complaint, p. 14 (ECF #528) (quoting Second Amended Complaint at ¶ 88 (ECF #500)). Plaintiff's First Amended Complaint (ECF #127) failed to allege an attempt to monetize the property's value, therefore plaintiff had not alleged a concrete financial loss. Findings & Recommendation, p. 9 (ECF #486). Plaintiff now alleges she has "continuously and publicly advertised" her property for sale since April 2019, and she has not received an offer at any price, despite reducing her asking price several times. Second Amended Complaint at ¶ 88 (ECF #500). The issue before the Court is whether plaintiff's intent to monetize the property's value sufficiently alleges a concrete financial loss.

In the Ninth Circuit, when evaluating whether a plaintiff has sufficiently alleged concrete financial loss, courts must "examine carefully the nature of the asserted harm." Canyon County v. Syngenta Seeds, Inc., 519 F.3d 969, 975 (9th Cir. 2008) (quoting Oscar v. Univ. Students Coop. Ass'n, 965 F.2d 783, 785 (9th Cir. 1992)). Beyond merely alleging financial loss, a plaintiff must allege harm to a specific business or property interest, which is a categorical inquiry typically determined by reference to state law. Id. Without harm to a specific property interest, "there is no injury . . . within the meaning of RICO." Id. (quoting Diaz v. Gates, 420 F.3d 897, 900 (9th Cir. 2005)).

The Ninth Circuit defines concrete financial loss as a showing of actual financial loss to the plaintiff. Steele v. Hospital Corp. of America, 36 F.3d 69, 70 (9th Cir. 1994) ("It is not enough that the patients show that their insurance company had to pay out more than it otherwise would have without the alleged RICO violation. This does not constitute financial loss to them."); Oscar, 965 F.2d at 787 n. 5 ("If Oscar's Maserati was smashed, or her house was burned down, she is injured in a variety of ways. However, if her insurance pays the full cost of replacing these items, she has suffered no *financial* loss." (emphasis in original)). Financial loss is not "injury to a valuable intangible property interest." Oscar, 965 F.2d at 785 (quoting Berg v. First State Ins. Co., 915 F.2d 460, 464 (9th Cir. 1990)).

Under similar facts and after a thorough analysis of the concrete financial loss requirement, this District found "that a plaintiff who has not alleged specific prior attempts to monetize a property interest must plausibly allege at least a present intent or desire to do so." Ainsworth v. Owenby, 326 F. Supp. 3d 1111, 1125 (D. Or. 2018); see generally Oscar, 965 F.2d at 787 (holding an abstract drop in the fair market value of plaintiff's leasehold interest was not a concrete financial loss because plaintiff had not alleged an intent to sublet her interest). Specifically, this District has held, "in order to plausibly allege a concrete financial loss in this case, Plaintiffs 'must make good faith allegations that they attempted or currently desire to convert those [property] interests into a pecuniary form.'" Shoultz v. Derrick, 369 F. Supp. 3d 1120, 1128 (D. Or. 2019) (quoting Ainsworth, 326 F. Supp. 3d at 1126) (alteration in original). Previously, this Court recognized plaintiff had not "alleged a desire to sell her property and thus any alleged diminution in value represents a purely speculative loss." Findings & Recommendations, p. 7 (ECF #486).

Here, plaintiff has amended her complaint to conform with this pleading requirement. Plaintiff now alleges not only diminution in value, but also that defendants' conduct amounts to a

barrier that prevents her from selling her property and converting the property's equity into a pecuniary form. Accordingly, the motion to dismiss, on this basis, should be denied.

B. Cognizable Injury Under State Law

Defendants argue that plaintiff's allegations of diminished property value do not constitute a property injury under Oregon law because the alleged harm is only temporary. Defendants' Motion to Dismiss Second Amended Complaint, p. 10 (ECF #528). The validity of plaintiff's claim relies, in part, on whether she has sufficiently alleged a property injury cognizable under state law.

As defendants note, diminution in value caused by a temporary nuisance is not a cognizable property injury. Porges v. Jacobs, 75 Or. 488, 493, 147 P. 396, 398 (1915). In fact, it is error to admit "testimony as to the depreciation in the market value of plaintiff's property caused by the alleged nuisance" when "the alleged nuisance is temporary and can be abated." Id. at 398; see Fowler v. Crown-Zellerbach Corp., 163 F.2d 773 (9th Cir. 1947) (citing Porges for the proposition that "it is error to admit evidence of depreciation in the market value of a complainant's property caused by a nuisance that is temporary and which can be abated.") "Temporary injury, or injury which is reasonably susceptible of repair, justifies damages measured by the loss of use or rental value during the period of the injury, or the cost of restoration, or both, depending on the circumstances." Hudson v. Peavey Oil Co., 279 Or. 3, 10, 566 P.2d 175, 179 (1977) (citing Lemon v. Madden, 216 Or. 539, 546, 340 P.2d 977 (1959)); Huber v. Portland Gas & Coke Co., 128 Or. 363, 367-68, 274 P. 509 (1929) (though the court was discussing a trespass claim, this case is illustrative in an analysis of the Oregon jurisprudential approach to property injuries and remedies). Accordingly, under Oregon law, a plaintiff cannot recover damages for diminution in market value caused by temporary nuisances that can be abated.

Plaintiff alleged that she intends to sell her house, has been attempting to sell her house continuously since April 2019, has not received any offers on her house, and her asking price is less than that of comparable properties. She does not merely allege the value of her house has decreased, but that she is wholly incapable of selling her house. Plaintiff is allegedly unable to monetize her property interest because of the Marijuana Operation. Even if the nuisance has abated, or were to cease in the future, plaintiff has lost the ability to monetize her property at the time she wishes, which may lead to damage that cannot be remedied via a future sale when the nuisance ends. In addition, whether the nuisance has ceased, or is temporary, is a question appropriately resolved on summary judgment. Plaintiff's allegations, taken in the light most favorable to her, establish a past harm, rather than a prospective or speculative harm, for which she could recover under Oregon law. Accordingly, the motion to dismiss should be denied.

C. Plausibility of Plaintiff's Allegations

The parties have asked this Court to take judicial notice of several items under Fed. R. Evid. 201. Defendants request the Court take judicial notice of: (1) the OLCC list of approved marijuana business licenses, indicating the absence of defendants' business and the Highway 26 property; and (2) LUBA's decision affirming approval of the change in use application, which defendants attached as Exhibit 1 to their Reply in Support of the Motion to Dismiss Plaintiff's Second Amended Complaint, p. 4, n. 1 (ECF #544). Plaintiff asks this Court to take judicial notice of the decision contained in Clackamas County Planning and Zoning file no. Z0630-17. Plaintiff's Response to Defendants' Motion to Dismiss Second Amended Complaint, p. 6, n. 1 (ECF #541). Additionally, plaintiff represents that Clean Remedies, LLC, has been processing and producing marijuana products at the Candy Farm Property, based on a Land Use Compatibility Statement

plaintiff obtained through a FOIA request. Plaintiff's Supplemental Response in Opposition to Defendants' Motion to Dismiss (ECF #552).[1]

Generally, a court may not consider materials not included in the pleadings in deciding a Rule 12 motion. Fed. R. Civ. P. 12(d). Nonetheless the court "may take judicial notice of matters of public record" and consider them without converting a Rule 12 motion into one for summary judgment. Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001) (internal quotation marks and citation omitted). Judicial notice is appropriate for records and "reports of administrative bodies." Interstate Natural Gas Co. v. S. Cal. Gas Co., 209 F.2d 380, 385 (9th Cir. 1953). Accordingly, the Court takes judicial notice of the requested items: LUBA No. 2019-075; OLCC Marijuana Business Licenses; Clackamas County Planning and Zoning file no. Z0630-17; and Clean Remedies Land Use Compatibility Statement, dated February 13, 2019. Additionally, the Court has previously taken judicial notice of Record Number Z0094-19. See Findings & Recommendations, p. 10 (ECF #486).

Plaintiff asserts the neighboring Marijuana Operation has prevented and continues to prevent her from selling her property or even from receiving an offer. Defendants argue that, if this is indeed true, plaintiff is her own impediment to receiving offers and selling her property because of her opposition to the alteration in land use at the Candy Farm Property.[2]

To survive a motion to dismiss, plaintiff must make sufficient factual allegations to "nudg[e] [her] claims across the line from conceivable to plausible." Bell Atl. Corp. v. Twombly,

[1] Plaintiff provided the Land Use Compatibility Statement as Exhibit B to her supplemental response (ECF #553).

[2] Plaintiff opposes the change in use of the Candy Farm to "a bakery and food processing business, shared commissary kitchens and food wholesaling and delivery." Plaintiff's Response to Defendants' Motion to Dismiss Second Amended Complaint, p. 5 (ECF #541). Plaintiff contends such a change would have a greater adverse impact on the neighborhood and cause "even more difficulty in selling her property." Id. at 6.

550 U.S. 544, 570 (2007); see Eclectic Props. East, LLC v. Marcus & Millichap Co., 751 F.3d 990, 995-97 (9th Cir. 2014) (discussing pleading standards in RICO claims).

Accepting plaintiff's allegations as true establishes that plaintiff has been attempting to sell her property since April 2019, her property has not sold, there is a smell of marijuana on her property that is heightened on warm days, she has reduced her asking price several times, and she has yet to receive even a single offer at any price, even though her asking price "is materially less than the sale prices of comparable properties not located next door to marijuana operations." Second Amended Complaint at ¶ 88 (ECF #500).

Plaintiff alleges that another entity, Clean Remedies, LLC, has begun operating a marijuana production facility on the Candy Farm Property. That allegation provides some support for plaintiff's assertion that the Marijuana Operation has not abated. Coupled with the allegation that she continues to smell marijuana on her property, the Court could plausibly infer that the Marijuana Operation has not abated and is preventing plaintiff from selling her property.

The parties have extensively briefed the Court on their interpretations of the judicially noticeable records, however, even considering these records, plaintiff has sufficiently alleged conduct by the defendants that could constitute a RICO violation. These records are inconclusive on the issue of whether the Marijuana Operation has abated. Specifically, the judicially noticed records do not conclusively establish that the Marijuana Operation has been abated such that it is not plausible the damage (inability to sell) is not proximately caused by the alleged RICO violation (marijuana production). The Court is sympathetic to the issues raised by defendants; however, it is not appropriate for the Court to resolve these issues on a motion to dismiss. Accordingly, the motion to dismiss should be denied.

D. Causation

The N&A defendants raise an additional ground to dismiss the second amended complaint. N&A argues "Plaintiff's SAC does not even satisfy a threshold 'but for' causation analysis – beyond rank speculation/conjecture – much less the 'proximate cause' element – to support a RICO claim." N&A Defendant's joinder in motion to dismiss, p. 5 (ECF #533).

"When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries." Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 461 (2006). The Ninth Circuit has identified three factors to consider in a proximate cause analysis:

> (1) whether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries.

Ainsworth, 326 F. Supp. 3d at 1127 (quoting Newcal Indus. Inc. v. Ikon Office Solution, 513 F.3d 1038, 1055 (9th Cir. 2008)). N&A Defendants provide no basis for this Court to conclude any of these factors weigh in their favor. There is no readily discernable, more direct victim of the alleged harm; defendants provide no reason to believe it will be difficult to ascertain the amount of damages attributed to their wrongful conduct; and nothing suggests the Court will have to adopt a complicated rule to avoid multiple recoveries. As alleged, the second amended complaint provides facts to plausibly infer that defendants' conduct causes plaintiff's property to remain unsold. At the very least, there are issues of fact surrounding the causation inquiry that are not appropriate for resolution on a motion to dismiss. Accordingly, the motion to dismiss should be denied.

CONCLUSION

Defendants' motion to dismiss (ECF #528) should be denied.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties shall have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determination of the Magistrate Judge will be considered as a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to this recommendation.

DATED this 5th day of March, 2020.

/s/ Jolie A. Russo
JOLIE A. RUSSO
United States Magistrate Judge