UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

NURA WASHINGTON BEY,

Plaintiff,

v. **Case No: 8:14-cv-954-T-27AEP**

CITY OF TAMPA CODE ENFORCEMENT and STEVE MATEYKA,

Defendants.
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ORDER

BEFORE THE COURT is Defendants City of Tampa Code Enforcement and Steve Mateyka's Dispositive Motion to Dismiss and Supporting Memorandum of Law (Dkt. 9), and pro se Plaintiff Nura Washington Bey's Motion to Object & Strike Defendants' Dispositive Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(f)(2) and 7(a)(1-7) (Dkt. 10), which is construed as Plaintiff's response. Upon consideration, Defendants' motion is GRANTED and Plaintiff's motion is DENIED.

I. BACKGROUND

Plaintiff owns real property located at 2113 North Fremont Avenue, which is known as Al Moroc Humanity Park by Moorish Nationals like Plaintiff (Dkt. 1 at 5).[1] They congregate every Sunday at the park to practice Islam. *Id.* On April 22, 2014, Plaintiff filed a Petition Lawsuit to hold the Defendants responsible for violations of her constitutional rights (Dkt. 1). Plaintiff alleges discrimination in violation of the 1st, 4th and 9th Amendments of the Constitution (Count 1), and violations of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc (Count 2). *Id.* Plaintiff argues that Defendants are "attempting to disband [their] fellowship

[1]Pro se complaints are held to less stringent standards than pleadings drafted by lawyers. *Dean v. Barber*, 951 F.2d 1210, 1213 (11th Cir. 1992).

by citing counterfeit ordinance violations and placing a lien on [the property]." *Id.* at 5.

Plaintiff's claims stem from an incident that took place on August 27, 2013 when Mateyka allegedly blocked the property's driveway barring entry and exit. *Id.* at 3. Plaintiff filed an ethics complaint on the same day with the City of Tampa Ethics Commission arguing that Mateyka was sitting in a City of Tampa code enforcement vehicle deliberately blocking their driveway (Dkt. 1-2 at 1-2). Plaintiff asserted that Mateyka violated the purpose and legislative intent of a public servant by blocking their driveway and questioning their usage of the property. *Id.* at 1. Plaintiff also argued that Mateyka's actions constituted misuse of his position and public property. *Id.* at 1-2.[2]

On October 2, 2013, Mateyka inspected Plaintiff's property and sent a Notice of Violation the next day listing infractions to the City of Tampa's Code, Sections 27-132, 27-289, 27-283.2 and 27-84. *Id.* at 11-12. The Notice advised that Plaintiff "must apply for a special use to operate a recreational facility, private at this location." *Id.* at 11. It noted that there was excessive signage, which needed to be permitted, and Plaintiff had to apply for a change of use. *Id.* It warned that failure to receive permits and zoning approval would require everything built and installed on the property to be removed in order to return the property back to vacant lot status. *Id.*

On April 2, 2014, Special Magistrate Alex Dunmire held a public Municipal Code Enforcement hearing regarding Plaintiff's code violations, case #13-12750. *Id.* at 19 (C/D of hearing). Plaintiff attended the hearing and challenged the Special Magistrate's jurisdiction orally and in writing. *Id.* at 13-15 & 19. Plaintiff asserted she was a victim of discrimination because of

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[2]On September 5, 2013, the City of Tampa acknowledged receipt of Plaintiff's complaint to the Ethics Commission. *Id.* at 5-6. Plaintiff in response sent the Ethics Commission a letter dated September 13, 2013 detailing her husband's account of the incident. *Id.* at 3-4. On November 5, 2013, the City of Tampa sent Plaintiff a letter advising that the Ethics Commission met on October 24, 2013 in an Executive Session to review her complaint. *Id.* at 9. "The Ethics Commission, by a unanimous decision,. . .determined that the facts alleged in [Plaintiff's] complaint [did] not constitute probable cause that a violation of any of the provisions of the City Ethics Code cited. . .occurred." *Id.* The Ethics Commission would not conduct any further investigation into the matter. *Id.*

her "Moorish American National" status. *Id.* City of Tampa Code Enforcement Inspector Bill Davidson testified that the case originated on August 27, 2013[3] and that he ordered the inspection to Plaintiff's property. *Id.* at 19. Davidson confirmed that the code violations listed in the Notice were still present. *Id.* The Special Magistrate gave Plaintiff the opportunity to present evidence and plead guilty or not guilty, but she declined still challenging his jurisdiction. *Id.* The Special Magistrate found Plaintiff guilty of the code violations and set April 30, 2014 as the deadline to correct them. *Id.*

The Special Magistrate issued an Order with Findings of Fact that Plaintiff owned the property located at 2113 Fremont Avenue, which was still in violation of the City of Tampa Code as listed in the Notice. *Id.* at 16-18. Pursuant to Chapter 162 of the Florida Statutes and Chapter 9 of the City of Tampa Code, he ordered Plaintiff to correct the violations, and advised that failure to comply would result in a $100 per day fine for any violation that continued past the date set for compliance. *Id.* The Code Enforcement Board authorized the City Clerk's Office to record the Order in the Public Records of Hillsborough County thereby imposing a lien against Plaintiff's property as long as it was not her homestead. *Id.* The Order authorized the City Attorney to foreclose, collect or settle any unpaid lien amount accrued after three months. *Id.* The Order advised Plaintiff she had a right to file a motion for rehearing and a right to appeal. *Id.*

Defendants move to dismiss Plaintiff's complaint alleging that City of Tampa Code Enforcement is not an entity capable of being sued, and that Plaintiff has failed to state a cause of action under the 1st, 4th, and 9th Amendments of the U.S. Constitution, as well as under RLUIPA and 42 U.S.C. § 1983.

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[3]This is the day of the incident at Plaintiff's property that prompted her Ethics complaint against Mateyka.

II. STANDARD

A complaint should contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This Rule does not require detailed factual allegations, but it demands more than an unadorned, conclusory accusation of harm. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The complaint must "plead all facts establishing an entitlement to relief with more than 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action.'" *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1324 (11th Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

"[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 556 U.S. at 679 (citing *Twombly*, 550 U.S. at 556). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (citing *Twombly*, 550 U.S. at 556). This plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citing *Twombly*, 550 U.S. at 556). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679 (citing *Iqbal v. Hasty*, 490 F.3d 143, 157 (2d Cir. 2007), *rev'd sub nom. Ashcroft v. Iqbal*, 556 U.S. 672 (2009)). Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has not shown that the pleader is entitled to relief. *Id.*

All of the factual allegations contained in the complaint must be accepted as true for the purposes of a motion to dismiss, but this tenet is "inapplicable to legal conclusions." *Id.* at 678. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* at 679. All reasonable inferences must be drawn in the plaintiff's favor. *St. George v. Pinellas Cnty.*, 285 F.3d 1334, 1337 (11th Cir. 2002). Although the court is required to

show leniency to a *pro se* plaintiff's pleadings, his complaint is still "subject to the relevant law and rules of court, including the Federal Rules of Civil Procedure." *Moon v. Newsome*, 863 F.2d 835, 837 (11th Cir. 1989).

III. DISCUSSION

A. City of Tampa Code Enforcement

Defendants argue that the City of Tampa Code Enforcement is not an entity capable of being sued because it is merely a department of the City of Tampa. In a similar case, the Eleventh Circuit explained that state law dictates which legal entities are capable of suit. *Dean*, 951 F.2d at 1214-15 (*quoting* Fed.R.Civ. 17(b) and holding that under Alabama law, sheriff's department lacked the capacity to be sued). Florida courts have held that unless explicitly empowered to, municipal departments are not capable of suit. *Lederer v. Orlando Utilities Comm'n*, 981 So. 2d 521, 525-26 (Fla. 5th DCA 2008) ("Generally, a municipal department is not a separate legal entity and does not have the capacity to sue or be sued, [includes] a police or fire department, planning department or city attorney's office."); *N. Miami Beach Water Bd. v. Gollin*, 171 So. 2d 584, 585-86 (Fla. 3d DCA 1965) (department of municipality had no standing to intervene because it had no power to sue or be sued).

Defendants contend that the City of Tampa would be the proper party because under the Charter and Related Laws, Part B, Article II, Section 2.01, the City of Tampa was provided full power and authority to sue and be sued. *Charter and Related Laws, City of Tampa, Florida*, Supplement No. 85, Volume I, p. 86.20, January 2014, http://www.tampagov.net/dept_planning/files/Supp_85/Supp_85_Vol_I_012814.pdf. Allowing Plaintiff to amend her complaint and name City of Tampa as the correct defendant would cure this defect, but ultimately would not grant her the relief she seeks. The City of Tampa Code Enforcement, therefore, will be construed as the City of Tampa for analysis purposes *supra*.

B. Constitutional Amendments

i 1st Amendment

Plaintiff argues that "The city of Tampa Code Enforcement has no authority to stop [her] from exercising a fundamental right by putting a lien on [her] property with the threat to stop [her] freedom of association with fellow Moorish nationals." Dkt. 1 at 5. As to Mateyka, Plaintiff only mentions he temporarily blocked her property's driveway with his work vehicle. *Id.* at 3; Dkt. 1-2 at 1. Defendant argues that Plaintiff's allegation of a 1st Amendment violation is conclusory and lacks entitlement to relief.

The 1st Amendment of the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[4] Plaintiff does not proffer how the City of Tampa by enforcing its Code has violated her freedom of religion, speech or assembly as guaranteed by the 1st Amendment. The lien resulting from her code violations does not prevent her from practicing Islam and congregating at her property. Neither did Mateyka temporarily blocking her property's driveway during his inspections. Plaintiff merely has to comply with the Code's rules and regulations, like all citizens living in the City of Tampa. Plaintiff does not challenge the constitutionality of the Code and its ordinances, only asserts that the Special Magistrate had no jurisdiction over her. Plaintiff's 1st Amendment cause of action against Defendants has no merit and must be dismissed with prejudice.

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[4]The 1st Amendment does not explicitly create a cause of action when it is available through a statute created by Congress. *Georgiacarry.org, Inc. v. Georgia*, 687 F.3d 1244, 1253 (11th Cir. 2012). "Where a statute provides an adequate remedy,. . .a judicially created cause of action [will not be implied] directly under the Constitution." *Id.* at 1253 n.15 citing *Bush v. Lucas*, 462 U.S. 367, 390 (1983). An analysis of these constitutional amendments under 42 U.S.C. § 1983, therefore, follows *supra*.

ii 4th Amendment

Defendants argue that Plaintiff did not make any argument that she suffered an unreasonable search or seizure in violation of the 4th Amendment. Plaintiff merely cites the language of the 4th Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Nothing in the facts alleged in the complaint supports an allegation that Plaintiff suffered a violation of her 4th Amendment rights. A visual inspection by the City of Tampa Code Enforcement as conducted by Mateyka and the resulting lien do not amount to a search and seizure.[5] Moreover, in *Camara v. Municipal Court of City & County of San Francisco*, the Supreme Court held that "inspection programs aimed at securing city-wide compliance with minimum physical standards for private property" are reasonable under the 4th Amendment. *Camara*, 387 U.S. 523, 535-38 (1967). Plaintiff's 4th Amendment cause of action against Defendants is meritless and must be dismissed with prejudice.

iii 9th Amendment

Defendants argue that the 9th Amendment is a residual clause to the Constitution and does not provide a legal basis for Plaintiff to make a claim. Plaintiff again only cites the language of the amendment, which states "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Plaintiff does not articulate which of her rights are protected under the 9th Amendment or how Defendants allegedly violated them. Even

[5]"A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed[, and a] 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

if the 9th Amendment granted Plaintiff a cause of action,[6] she has not proffered any arguments to support such cause of action. Plaintiff's 9th Amendment cause of action against Defendants is dismissed with prejudice.

C. Section 1983

Due to Plaintiff's pro se status, her constitutional claims will also be analyzed as civil rights violations brought under 42 U.S.C. § 1983.[7] To allege a Section 1983 claim, Plaintiff must, at a minimum, allege that: (1) she suffered a deprivation of rights, privileges or immunities secured by the Constitution and/or laws of the United States and (2) the act or omission causing the deprivation was committed by a person acting under color of law. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Wideman v. Shallowford Cmty. Hosp. Inc.*, 826 F.2d 1030, 1032 (11th Cir.1987). Since Plaintiff did not allege a deprivation of her constitutional rights under the 1st, 4th or 9th Amendment, she also has failed to plead a Section 1983 cause of action.

Moreover, both the City of Tampa and Mateyka are entitled to qualified immunity because the complaint fails to allege a violation of a clearly established right, and they were acting within their discretionary authority. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("Government officials performing discretionary functions, generally are shielded from liability for civil damages insofar

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[6]The Eleventh Circuit has not addressed this issue, but in *Strandberg v. City of Helena*, the Ninth Circuit held that the 9th Amendment "has never been recognized as independently securing any constitutional right, for purposes of pursuing a civil rights claim." *Strandberg*, 791 F.2d 744, 748 (9th Cir. 1986).

[7] Section 1983 states that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The Eleventh Circuit has interpreted the *Harlow* standard as "shield[ing] all government officials except those who either are plainly incompetent or who knowingly violate the law." *Busby v. City of Orlando*, 931 F.2d 764, 773 (11th Cir. 1991); *see also Gonzalez v. Reno*, 325 F.3d 1228, 1233-34 (11th Cir. 2003). Defendants were neither incompetent nor knowingly violating the law. They are, therefore, entitled to qualified immunity from a Section 1983 claim.

D. RLUIPA

Defendants argue that Plaintiff lacks standing and fails to state a cause of action under RLUIPA. In order to invoke federal jurisdiction, Plaintiff must demonstrate: 1) an injury in fact or an invasion of a legally protected interest; 2) a direct causal relationship between the injury and the challenged action; and 3) a likelihood of redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 561. Here, Plaintiff has failed to establish an injury in fact. The complaint argues Defendants are discriminating against her for religious reasons, but in her hearing before the Special Magistrate she argued that the discrimination was because she is a Moorish American National (Dkt. 1-2 at 13). Plaintiff failed to show that her freedom of religion rights under the 1st Amendment were violated by Defendants.

Even if Plaintiff had standing, she is unable to establish an equal terms violation under Section (b)(1) of RLUIPA, "which provides that 'no government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1228-29 (11th Cir. 2004) (*quoting* 42 U.S.C. § 2000cc(b)(1)). Since the term religious assembly is not defined by RLUIPA, the Eleventh Circuit used its ordinary meaning and defined it as "a company

of persons collected in one place usually for some common purpose." *Id.* at 1230. Plaintiff congregates in her property with fellow Moorish Nationals to practice Islam, therefore, it could be considered a religious assembly for purposes of RLUIPA. Plaintiff, however, fails to articulate how the City of Tampa Code treats her religious assembly on terms less than equal to other nonreligious assemblies or institutions. Instead Plaintiff makes a conclusory and vague statement that "Defendants (city of Tampa code enforcement) currently allows other religious and nonreligious assemblies and institutions to operate in residential districts without being subjected to any enforcement action for such a violation." Dkt. 1 at 5. This alone cannot sustain Plaintiff's Section (b)(1) of RLUIPA cause of action.

Plaintiff also claims that Defendants filing violations and placing a lien against her property "constitutes the 'application' of a 'land use regulation' that 'limits or restricts a claimants use or development of land'" in violation of Section (a)(1) of RLUIPA. *Id.* This section of the RLUIPA only applies in three scenarios.[8] Plaintiff fails to specify the land use regulation and how it substantially burdens her religious exercise. *Midrash*, 366 F.3d at 1225-26. Defendants requiring Plaintiff to apply for a special use and permit for her signage is "an incidental effect on [Plaintiff's] religious exercise." *Id.* at 1227. In order for that to constitute a "substantial burden" under the

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[8] Section (a)(1) applies only if one of these three jurisdictional tests is first met:

> (A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;
>
> (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or
>
> (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

Midrash, 366 F.3d at 1225; 42 U.S.C. § 2000cc(a)(2).

RLUIPA, it "must place more than an inconvenience on religious exercise." *Id.* That is not the case here.

Lastly, Plaintiff claims Defendants "actions were to prevent organized religious services from taking place on the Al Moroc Humanity Park property," which constitutes religious discrimination in violation of Section (b)(2) of RLUIPA.[9] As previously discussed, Plaintiff has not proffered any facts to support her allegations of religious discrimination. Plaintiff cannot establish a cause of action under any of the Sections of the RLUIPA, and it is, therefore, dismissed with prejudice.

Accordingly,

1. Defendants' Dispositive Motion to Dismiss (Dkt. 9) is **GRANTED**.
2. Plaintiff's Motion to Object & Strike Defendants' Motion to Dismiss (Dkt. 10) is **DENIED**.
3. Plaintiff's Complaint (Dkt. 1) is **DISMISSED *with prejudice***.

DONE AND ORDERED this 24th day of July, 2014.

JAMES D. WHITTEMORE
United States District Judge

Copies to:
Counsel of Record and pro se plaintiff

[9] "No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." 42 U.S.C. 2000cc(b)(2).