

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

**SUMMARY ORDER**

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1           At a stated term of the United States Court of Appeals for  
2 the Second Circuit, held at the Thurgood Marshall United States  
3 Courthouse, 40 Foley Square, in the City of New York, on the  
4 23<sup>rd</sup> day of March, two thousand sixteen.

5  
6           **PRESENT: DENNIS JACOBS,**  
7                           **PETER W. HALL,**  
8    Circuit Judges  
9                           **JANE A. RESTANI,<sup>1</sup>**  
10   Judge.

11  
12           - - - - -X  
13           **RABBI JAMES BERNSTEIN, MOSHE AMBERS,**  
14           **BEATRICE ZAKS, SIMA ZAKS, NAFTOLI**  
15           **TESHER, MOSDOS CHOFETZ CHAIM, INC.,**  
16                            Plaintiffs-Appellants,

17  
18           **YESHIVA CHOFETZ CHAIM, INC., RABBI**  
19           **MAYER ZAKS, RABBI ARYEH ZAKS, RABBI**  
20           **NAFTOLI SOFER, MILTON B. SHAPIRO, SONYA**  
21           **SHAPIRO, THE TOWN BOARD OF THE TOWN OF**  
22           **RAMAPO,**  
23                            Plaintiffs,  
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<sup>1</sup> Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

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4 THE VILLAGE OF WESLEY HILLS, THE MAYOR  
5 AND BOARD OF TRUSTEES OF THE VILLAGE OF  
6 WESLEY HILLS, ROBERT H. FRANKL, in his  
7 official capacity, DAVID A GOLDSMITH,  
8 in his official capacity, ROBERT I.  
9 RHODES, in his former official  
10 capacity, JAY B. ROSENSTEIN, in his  
11 former official capacity, EDWARD B.  
12 MCPHERSON, in his official capacity,  
13 THE VILLAGE OF POMONA, THE MAYOR AND  
14 BOARD OF TRUSTEES OF THE VILLAGE OF  
15 POMONA, THE VILLAGE OF CHESTNUT RIDGE,  
16 THE MAYOR AND BOARD OF TRUSTEES OF THE  
17 VILLAGE OF CHESTNUT RIDGE, THE VILLAGE  
18 OF MONTEBELLO, THE MAYOR AND BOARD OF  
19 TRUSTEES OF THE VILLAGE OF MONTEBELLO,  
20 Defendants-Appellees.

21  
22 THE VILLAGE OF NEW HEMPSTEAD, THE MAYOR  
23 AND BOARD OF TRUSTEES OF THE VILLAGE OF  
24 NEW HEMPSTEAD, ROBERT A. MOSKOWITZ,  
25 TRSUTEE OF THE VILLAGE OF NEW  
26 HEMPSTEAD, in his individual and former  
27 official capacity, FORMER MAYOR  
28 HERBERT I. MARSHALL, in his individual  
29 and former official capacity, MAYOR OF  
30 POMONA NICHOLAS L. SANDERSON, in his  
31 individual and official capacity, JOHN  
32 DOE 1-37, JEROME KOBRE, MAYOR OF THE  
33 VILLAGE OF CHESTNUT RIDGE, in his  
34 individual and official capacity,  
35 TRUSTEE HOWARD L. COHEN, in his  
36 individual and official capacity,  
37 KATHRYN ELLSWORTH, FORMER MAYOR OF  
38 MONTEBELLO, in her individual and  
39 former official capacity, MAYOR OF  
40 MONTEBELLO JEFFREY OPPENHEIM, in his  
41 individual and official capacity,  
42 SCENIC DEVELOPMENT, LLC, TOWN OF

1 RAMAPO, THE PLANNING BOARD OF THE TOWN  
2 OF RAMAPO, THE BOARD OF APPEALS OF THE  
3 TOWN OF RAMAPO,  
4 Defendants.

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6 - - - - -X

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8 **FOR APPELLANTS:** JOSEPH J. HASPEL, Goshen, NY.

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10 **FOR VILLAGES APPELLEES:** MICHAEL D. ZARIN (Jody T. Cross, on  
11 the brief), Zarin & Steinmetz,  
12 White Plains, NY.

13  
14 **FOR POMONA APPELLEES:** GREGORY R. SARACINO, Milber Makris  
15 Plousadis & Seiden, LLP, White  
16 Plains, NY.

17  
18 Appeal from a judgment of the United States District Court  
19 for the Southern District of New York (Karas, J.).

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21 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND**  
22 **DECREED** that the judgment of the district court be **AFFIRMED**.

23  
24 Plaintiffs-appellants, religious organizations and  
25 affiliated individuals (collectively, the "Mosdos  
26 Plaintiffs"), appeal from the judgment of the United States  
27 District Court for the Southern District of New York (Karas,  
28 J.) granting summary judgment dismissing their discrimination  
29 complaint against villages and current and former officials for  
30 those villages (collectively, the "Villages Defendants"). We  
31 assume the parties' familiarity with the underlying facts, the  
32 procedural history, and the issues presented for review.

33 The Mosdos Plaintiffs are affiliated with the Chofetz Chaim  
34 sect of Orthodox Judaism and reside in the Town of Ramapo, New  
35 York (the "Town"). The Villages Defendants are incorporated  
36 villages located within the Town, and various associated  
37 officials. In 2001, the Town initiated a review of its local  
38 zoning laws, and in 2004, passed the Adult Student Housing Law  
39 ("ASHL") to permit the construction and operation of adult  
40 student living facilities in certain residential zones.  
41 Pursuant to the ASHL, predecessors to the Mosdos Plaintiffs

1 applied for site plan approval for the construction of an adult  
2 student housing facility ("Kiryas Radin") on a property (the  
3 "Nike Site") located near the Villages Defendants. As was  
4 required by New York's State Environmental Quality Review Act  
5 ("SEQRA"), the Town's Planning Board conducted an analysis on  
6 the impact the construction of Kiryas Radin would have on the  
7 environment and concluded that it would not be significantly  
8 adverse. Accordingly, the Town's Planning Board cleared the  
9 Mosdos Plaintiffs to build Kiryas Radin on the Nike Site.

10 As the Town's Planning Board finished its SEQRA review, a  
11 subset of the Villages Defendants filed a lawsuit in New York  
12 state court to challenge the ASHL and the Town Planning Board's  
13 SEQRA analysis (the "SEQRA Action"). In response, the Mosdos  
14 Plaintiffs filed counterclaims under 42 U.S.C. § 1983 alleging  
15 violations of the Free Exercise and Free Speech clauses of the  
16 First and Fourteenth Amendments, the Fair Housing Act, and the  
17 Religious Land Use and Institutionalized Persons Act.

18 While the parties litigated the SEQRA Action, the Mosdos  
19 Plaintiffs also filed a new action in federal court against the  
20 Villages Defendants, bringing claims under 42 U.S.C. §§ 1981,  
21 1982, 1983, and 1985(3) alleging violations of the Free  
22 Exercise, Establishment, and Free Association clauses of the  
23 First and Fourteenth Amendments, the Equal Protection Clause  
24 of the Fourteenth Amendment, the Fair Housing Act, and various  
25 state laws (the "Equal Protection Action"). The core  
26 allegation in the Equal Protection Action was that the Villages  
27 Defendants filed the SEQRA Action for discriminatory reasons.

28 On March 31, 2010, the district court dismissed all of the  
29 Mosdos Plaintiffs' claims in the Equal Protection Action on the  
30 ground that the Villages Defendants were entitled to qualified  
31 immunity. Mosdos Chofetz Chaim, Inc. v. Village of Wesley  
32 Hills, 701 F. Supp. 2d 568, 604 (S.D.N.Y. 2010) (Mosdos I). The  
33 district court's analysis turned on applying the  
34 Noerr-Pennington doctrine<sup>2</sup> to the Mosdos Plaintiffs' civil  
35 rights claims. The district court held that for the Mosdos

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<sup>2</sup> The name derives from two cases from the 1960s in which the Supreme Court applied the First Amendment in the antitrust context. See E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965).

1 Plaintiffs to make out a discrimination claim based on the  
2 filing of the SEQRA Action, they had to allege that (i) they  
3 were selectively treated compared with others similarly  
4 situated, and (ii) the selective treatment was motivated by an  
5 intention to discriminate on the basis of, inter alia, religion.  
6 Id. at 603. Because the initial complaint failed to allege  
7 facts to show that similarly situated properties were treated  
8 differently, the district court dismissed the complaint without  
9 prejudice.

10 On September 26, 2011, the district court granted in part  
11 and denied in part the Villages Defendants' motion to dismiss  
12 the amended complaint in the Equal Protection Action. Mosdos  
13 Chofetz Chaim Inc. v. Village of Wesley Hills, 815 F. Supp. 2d  
14 679, 683 (S.D.N.Y. 2011) (Mosdos II). The district court  
15 concluded that the Mosdos Plaintiffs had adequately specified  
16 six similarly situated sites that the Villages Defendants did  
17 not treat the same as the Nike Site, that is, the Villages  
18 Defendants did not file a lawsuit to block the development on  
19 those sites. Id. at 700-04. Accordingly, discrimination  
20 claims against the Villages Defendants proceeded to discovery.

21 Meanwhile, the SEQRA Action continued. Though the subset  
22 of the Villages Defendants litigating the SEQRA Action  
23 persuaded a state court to grant them a preliminary injunction  
24 and temporary restraining order against the Kiryas Radin  
25 construction, their claims were eventually dismissed on the  
26 merits. As a result, on December 5, 2012, the Mosdos Plaintiffs  
27 removed the SEQRA Action to federal court to pursue their  
28 counterclaims; there, it was consolidated with the Equal  
29 Protection Action.

30 On March 27, 2015, the district court granted summary  
31 judgment to the Villages Defendants on the Mosdos Plaintiffs'  
32 claims in the Equal Protection Action and their counterclaims  
33 in the SEQRA Action. Bernstein v. Village of Wesley Hills, 95  
34 F. Supp. 3d 547, 551 (S.D.N.Y. 2015) (Mosdos III). The district  
35 court concluded that the Mosdos Plaintiffs failed to produce  
36 evidence sufficient to raise a genuine issue of material fact  
37 as to similarly situated sites that were treated differently  
38 or as to whether the Villages Defendants acted out of  
39 discriminatory animus. The district court also rejected the

1 Mosdos Plaintiffs' argument that they had a valid RLUIPA claim  
2 based on this Court's opinion in Fortress Bible Church v.  
3 Feiner, 694 F.3d 208 (2d Cir. 2012). In this appeal, the Mosdos  
4 Plaintiffs challenge only the determination that they failed  
5 to present sufficient evidence to sustain their discrimination  
6 claims against the Villages Defendants.

7 We review de novo a district court's grant of summary  
8 judgment. Noll v. Int'l Bus. Mach. Corp., 787 F.3d 89, 93 (2d  
9 Cir. 2015). Summary judgment must be granted if "there is no  
10 genuine dispute as to any material fact and the movant is  
11 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).  
12 "In assessing the record to determine whether there is a genuine  
13 issue as to any material fact, the court is required to resolve  
14 all ambiguities and draw all factual inferences in favor of the  
15 party against whom summary judgment is sought." Noll, 787 F.3d  
16 at 94 (internal brackets and citation omitted). A genuine  
17 issue of material fact is one that "might affect the outcome  
18 of the suit under the governing law" and as to which "a  
19 reasonable jury could return a verdict for the nonmoving party."  
20 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

21 **1.** As an initial matter, the Mosdos Plaintiffs do not  
22 appeal from Mosdos I or Mosdos II. Their Pre-Argument  
23 Statement (Form C) states that they are only appealing from a  
24 summary judgment order and that the only issues raised on appeal  
25 are those that concern the summary judgment opinion in Mosdos  
26 III. The Mosdos Plaintiffs' brief represents that the only  
27 issue presented is whether the district court properly granted  
28 summary judgment for the Villages Defendants, and the only  
29 opinion included in the Mosdos Plaintiffs' Special Appendix is  
30 Mosdos III. The Villages Defendants argue at length in their  
31 brief that the Mosdos Plaintiffs are not appealing from Mosdos  
32 I or Mosdos II and the Mosdos Plaintiffs do not rebut this  
33 contention in their reply. Accordingly, we lack jurisdiction  
34 to review the district court's opinions in Mosdos I and Mosdos  
35 II. See Shrader v. CSX Transp., Inc., 70 F.3d 255, 256 (2d Cir.  
36 1995). The remaining issue before us is whether the district  
37 court properly granted summary judgment for the Villages  
38 Defendants. We assume without deciding that the district  
39 court's Noerr-Pennington-based analysis for determining

1 whether the Villages Defendants are entitled to qualified  
2 immunity, detailed in Mosdos I and Mosdos II, is correct.

3       **2.** Turning to Mosdos III, the district court's thorough  
4 and well-reasoned opinion demonstrated that the Mosdos  
5 Plaintiffs failed to produce evidence sufficient for a jury  
6 finding either that (i) there were similarly situated sites or  
7 (ii) the Villages Defendants acted out of discriminatory  
8 animus. Kiryas Radin is a residential complex containing sixty  
9 residential units at a density of 12.8 units per acre and a  
10 number of non-residential buildings. The Nike Site sits on a  
11 two-lane road of low-to-moderate capacity, is surrounded by a  
12 low-density residential district that contains mostly single  
13 family homes, and is approximately one mile from the nearest  
14 commercial development. The Mosdos Plaintiffs failed to  
15 provide credible evidence that any of the purported comparable  
16 sites were similarly situated, e.g., that they had a similar  
17 impact on traffic and community character, or that the Villages  
18 Defendants knew of the comparable sites before they were built.  
19 The Mosdos Plaintiffs also failed to offer evidence that the  
20 Villages Defendants were driven by discriminatory animus in  
21 bringing the SEQRA Action. Rather, there is no real dispute  
22 that the Villages Defendants were motivated by a genuine concern  
23 that the ASHL and Town's SEQRA analysis would result in adverse  
24 effects on the environment. Accordingly, we conclude that the  
25 Villages Defendants are entitled to qualified immunity on the  
26 Mosdos Plaintiffs' claims and counterclaims.

27       The Mosdos Plaintiffs raise one additional issue. They  
28 assert that Fortress Bible provides them with either a cause  
29 of action or a theory of discrimination that sustains their  
30 claims. It does neither. Fortress Bible concerned a  
31 municipality abusing the SEQRA review process as a vehicle for  
32 executing its zoning regulations in connection with a church's  
33 land use proposal for a site located within that municipality's  
34 jurisdiction. Here, the Villages Defendants - none of which  
35 had jurisdiction over the Nike Site or Kiryas Radin project -  
36 filed a lawsuit to challenge some other municipality's SEQRA  
37 review. Fortress Bible is inapposite.

1           Accordingly, and finding no merit in Mosdos Plaintiffs'  
2 other arguments, we hereby **AFFIRM** the judgment of the district  
3 court.

4    FOR THE COURT:  
5    CATHERINE O'HAGAN WOLFE, CLERK