In the United States Court of Appeals for the Second Circuit

AUGUST TERM 2020

No. 20-4238-cv

MARCIA MELENDEZ, JARICAN REALTY INC., 1025 PACIFIC LLC, LING YANG, TOP EAST REALTY LLC, HAIGHT TRADE LLC, ELIAS BOCHNER, 287 7TH AVENUE REALTY LLC,

Plaintiffs-Appellants,

v.

CITY OF NEW YORK, a municipal entity, MAYOR BILL DE BLASIO, as Mayor of the City of New York, COMMISSIONER LOUISE CARROLL, Commissioner of New York City Department of Housing Preservation & Development, COMMISSIONER JONNEL DORIS, Commissioner of New York City Department of Small Business Services,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

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ARGUED: MAY 3, 2021

DECIDED: OCTOBER 28, 2021

Before: CABRANES, RAGGI, and CARNEY, *Circuit Judges*.

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Plaintiffs, New York City landlords, appeal from a November 30, 2020 judgment of the United States District Court for the Southern District of New York (Abrams, *J.*), dismissing their constitutional challenges, brought pursuant to 42 U.S.C. § 1983, to certain New York City laws enacted in response to the COVID-19 pandemic. *See* Fed. R. Civ. P. 12(b)(6). Plaintiffs allege that amendments to the City's Residential and Commercial Harassment Laws, *see* N.Y.C. Admin. Code §§ 22-901 *et seq.*, 27-2004 *et seq.*, which prohibit "threatening" tenants based on their COVID-19 status, violate the Free Speech and Due Process Clauses of the First and Fourteenth Amendments by restricting commercial speech in the ordinary collection of rents and failing to provide fair notice of what constitutes proscribed threatening conduct. *See* U.S. Const. amends. I & XIV. They further allege that N.Y.C. Admin. Code § 22-1005 ("Guaranty Law") violates the Contracts Clause by rendering unenforceable certain personal guaranties of commercial lease obligations. *See* U.S. Const. art. I, § 10 cl. 1. While we agree that plaintiffs fail to allege plausible First and Fourteenth Amendment claims as to the amendments to the Harassment Laws, we conclude that they do allege a plausible Contracts Clause challenge to the Guaranty Law. We, therefore, further conclude that plaintiffs' Contracts Clause claim should not have been dismissed nor should their motion for preliminary injunctive and declaratory relief have been denied without review.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED.

Judge Carney concurs in the result in part and dissents in part in a separate opinion.

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CLAUDE G. SZYFER, Stroock & Stroock & Lavan LLP, New York, New York, *for Plaintiffs-Appellants.*

JAMISON DAVIES, Assistant Corporation Counsel (Richard Dearing, Devin Slack, *on the brief*), *for* James E. Johnson, Corporation Counsel of the City of New York, New York, New York, *for Defendants-Appellees*.

Deborah E. Riegel, Rosenberg & Estis, P.C., New York, New York, *for amici curiae Rent Stabilization Association of N.Y.C., Inc. and Community Housing Improvement Program*.

Michael J. Harris, Jonathan A. Herstoff, Haug Partners LLP, New York, New York; Arthur Kats, Volunteers of Legal Service, New York, New York, *for amicus curiae Volunteers of Legal Service*.

LiJia Gong, Public Rights Project, Brooklyn, New York, *for amici curiae the Cities of Chicago, Santa Monica, and 17 Additional Local Governments.*

Joshua A. Matz, Raymond P. Tolentino, Molly Webster, Kaplan Hecker & Fink LLP, New York, New York, *for amici curiae Constitutional Law Scholars*.

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REENA RAGGI, *Circuit Judge*:

In response to the COVID-19 pandemic, governments at all levels—federal, state, and local—enacted laws to address health, safety, and economic concerns. Some of these laws have operated affirmatively, with the federal government in particular appropriating trillions of dollars to fund vaccine development and distribution, to enhance unemployment benefits, to stimulate the economy, etc. Other laws have operated negatively to proscribe communal conduct, to limit or excuse financial obligations, to preclude or limit certain legal remedies, etc. At issue in this appeal are certain laws falling into the second category and enacted by New York City ("City") in May 2020, at the height of the pandemic, specifically, (1) amendments to the City's existing Residential and Non-Residential (*i.e.*, "Commercial") Harassment Laws, *see* N.Y.C. Admin. Code §§ 22-901 *et seq.*, 27-2004 *et seq.* (together the "Harassment Amendments"), which prohibit "threatening" residential or commercial tenants based on their COVID-19 status; and (2) N.Y.C. Admin. Code § 22-1005 (the "Guaranty Law"), which renders permanently unenforceable personal liability guaranties of commercial lease obligations arising between March 7, 2020, and June 30, 2021.

In this action, filed in the United States District Court for the Southern District of New York (Ronnie Abrams, *J.*), plaintiffs, Marcia Melendez, Ling Yang, Elias Bochner, and the corporate landlords in which they own interests, sue the City and various named City officials under 42 U.S.C. § 1983 for a judgment declaring the challenged laws unconstitutional and for an injunction permanently

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enjoining their enforcement. They allege that the Harassment Amendments violate the Free Speech and Due Process Clauses of the United States and New York State Constitutions by impermissibly restricting commercial speech in the ordinary collection of rents and by failing to provide fair notice of what constitutes threatening conduct. *See* U.S. Const. amends. I & XIV; N.Y. Const., art. I § 8. Plaintiffs further allege that the Guaranty Law violates the United States Constitution's Contracts Clause, which prohibits "State . . . Law[s] impairing the Obligation of Contracts," U.S. Const. art. I, § 10, cl. 1.[1] Plaintiffs now appeal from a judgment of the district court entered on November 30, 2020, (1) granting defendants' motion to dismiss plaintiffs' amended complaint in its entirety for failure to state a claim, *see* Fed. R. Civ. P. 12(b)(6); and (2) denying plaintiffs' motion for preliminary injunctive and declaratory relief without review. *See Melendez v. City of New York*, 503 F. Supp. 3d 13 (S.D.N.Y. 2020).

Upon *de novo* review of the challenged judgment, we conclude, as the district court did, that plaintiffs fail to allege plausible free speech and due process claims. As to their Contracts Clause challenge to the Guaranty Law, however, we conclude that the amended complaint, viewed most favorably to plaintiffs, does not permit a court to dismiss this claim pursuant to Rule 12(b)(6). Accordingly, we affirm the dismissal of plaintiffs' challenges to the Harassment Amendments, but we reverse the dismissal of their Contracts Clause

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[1] The Supreme Court has variously referred to this constitutional proscription as the "Contract Clause," *see, e.g.*, *United States Tr. Co. v. New Jersey*, 431 U.S. 1, 14 (1977), and the "Contracts Clause," *see, e.g.*, *Sveen v. Melin*, 138 S. Ct. 1815, 1821 (2018). In this opinion, we employ the latter, most recent appellation, except when quoted text does otherwise.

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