UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SIDEPOCKETS, INC.,	:	
	:	
Plaintiff,	:	
	:	
V.	:	CASE NO. 3:03CV742(RNC)
	:	
A. DENNIS MCBRIDE and PAUL M. SCHOLZ,	:	
	:	
Defendants.	:	

RULING AND ORDER

Plaintiff Sidepockets, Inc., doing business in Milford, Connecticut as "Keeper's Gentlemen's Club ("Keeper's"), brings this action pursuant to 42 U.S.C. §§ 1983 and 1985 against A. Dennis McBride and Paul M. Scholz, officials of the City of Milford, claiming that a temporary suspension of its food service license and closure of its business violated its rights under the First Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[1] Defendants have filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, contending that plaintiff has failed to state a claim on which relief may be granted and that they are entitled to qualified immunity as a matter of law. [Doc. #11] Plaintiff has filed a memorandum in

[1] The summons also names Richard Warner as a defendant but plaintiff makes no other reference to him and, accordingly, to the extent the action may be construed to include him, any claim against him is deemed abandoned.

opposition together with a motion to amend its complaint. [Doc. #18] Defendants' reply memorandum addresses the sufficiency of the amended complaint. The motion to amend is granted and, for the reasons outlined below, the motion to dismiss is granted in part and denied in part.

BACKGROUND

Plaintiff's amended complaint alleges the following facts, which are assumed to be true for purposes of the motion to dismiss. Plaintiff is licensed by the city of Milford to operate an adult entertainment and food service establishment. City officials have stated that they do not want adult entertainment establishments in Milford and that they will take measures to ensure that these businesses will have a difficult time operating.

On February 21, 2003, John DeMattia, an owner of the property where Keeper's is located, deliberately removed the water shut off valve for the premises and then contacted the City's Department of Public Health to complain that Keeper's had inadequate water pressure. Defendant Scholz, a city sanitarian, after investigating the complaint pursuant to orders by defendant McBride, the City's Director of Public Health, ordered the premises to be closed. McBride then issued to plaintiff a notice suspending its license to operate a food establishment for failure to supply working toilets and an adequate water supply in violation of the public health code.

After further investigation, McBride issued another notice of violation based on plaintiff's failure to correct the problem.

After a hearing on March 15, 2003, the license suspension was rescinded by McBride. Though other businesses on the premises were subject to the same lack of water pressure, no notices of violation or suspension were issued to them.

DISCUSSION

Section 1985(3) Claim

The motion to dismiss the § 1985(3) claim is granted.

"To state a cause of action under § 1985(3), a plaintiff must allege (1) a conspiracy; (2) for the purpose of depriving a person or class of persons of the equal protection of the laws, or the equal privileges and immunities under the laws; (3) an overt act in furtherance of the conspiracy; and (4) an injury to the plaintiff's person or property, or a deprivation of a right or privilege of a citizen of the United States." Thomas v. Roach, 165 F.3d 137, 146 (2d Cir. 1999). Defendants contend that plaintiff is not a member of a protected class for purposes of the second prong.

The second prong requires that the conspiracy must be motivated by "some racial or perhaps otherwise class-based, invidious discriminatory animus" on the part of the conspirators. Griffin v. Beckinridge, 403 U.S. 88, 102 (1971). Neither the Supreme Court nor the Second Circuit has addressed whether purveyors of adult

entertainment are a cognizable class under § 1985(3), but the case law suggests that they are not. See United Bhd. of Carpenters & Joiners of Amer. v. Scott, 463 U.S. 825, 836 (1983) (close question whether § 1985(3) intended to reach any class-based animus other than racial animus); Jews for Jesus, Inc. v. Jewish Comm. Relations Council, Inc., 968 F.2d 286, 291 (2d Cir. 1992) (religion is a cognizable class under § 1985); see also Haverstick Enters., Inc. v. Fin. Fed. Credit, Inc., 32 F.3d 989, 994 (6th Cir. 1994) ("[a] class protected by section 1985(3) must possess the characteristics of a discrete and insular minority, such as race, national origin, or gender"). Two other district courts have considered the question and have concluded that purveyors of adult entertainment are not a cognizable class. See Diva's, Inc. v. City of Bangor, 176 F. Supp. 2d 30, 38 (D. Me. 2001); Redner v. Citrus County, 710 F. Supp. 318, 322 (M.D. Fla. 1989), aff'd in part, rev'd in part on other grounds, 919 F.2d 646 (11th Cir. 1990). I agree with their conclusion.

Section 1983 First Amendment Claim

The motion to dismiss the § 1983 claim alleging a conspiracy to violate the First Amendment is denied.

"To prove a § 1983 conspiracy, a plaintiff must show: (1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in concert to inflict an

unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." Pangburn v. Culbertson, 200 F.3d 65, 72 (2d Cir. 1999). The amended complaint alleges sufficient facts to satisfy these requirements under the notice pleading standard of Rule 8(a) of the Federal Rules of Civil Procedure. It alleges that: (1) "The defendants and DeMattia had an agreement whereby DeMattia would arrange for a problem or problems to occur at the Premises and the Defendants would promptly arrive and shut down the Plaintiff's lawful business"; (2) "The purpose of the agreement between DeMattia was to cause the Plaintiff's lawful business, which included adult entertainment, to cease to operate, a stated purpose of the Defendants, Defendants' employer and DeMattia; and (3) "the purpose and motive of the Defendants' actions, in conspiring with DeMattia, were a dislike of and toward adult entertainment businesses in general, and of the Plaintiff in particular"; and (4) "as a result of the Defendant's entering into a conspiracy with DeMattia," plaintiff has suffered a "loss of business revenues, expenses incurred . . . ." (Am. Compl. ¶¶ 41, 48.) Greater particularity is not required.[2]

Section 1983 Equal Protection Claim

The motion to dismiss the § 1983 claim alleging a violation of

[2] Though a heightened pleading standard for conspiracy claims in civil rights cases used to be required by some courts, requiring allegations of specific facts evincing the conspiracy, more recent Supreme Court cases have rejected such a standard. See Toussie v. Powell, 323 F.3d 178, 185 n.3 (2d Cir. 2003).

plaintiff's right to impartial treatment under the Equal Protection Clause is denied.

A claim of selective enforcement in violation of the Equal Protection Clause is established when: "(1) the person, compared with others similarly situated, was selectively treated, and (2) the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure the person." Giordano v. City of New York, 274 F.3d 740, 750-51 (2d Cir. 2002). The amended complaint satisfies these criteria. It alleges that: (1) other businesses on the premises suffered from the same lack of water pressure, but defendants did not shut down those businesses; and (2) defendants' conduct was motivated by animus toward adult entertainment establishments. This is sufficient to withstand the motion to dismiss. See LaTrieste Rest. & Cabaret, Inc. v. Village of Port Chester, 40 F.3d 587 (2d Cir. 1994).[3]

[3] McBride's post-hearing decision, a copy of which is attached to the amended complaint, contains a finding that "Mr. Scholz also verbally instructed all of the other units at the premises to close." (Am. Compl., Ex. D, p. 3, ¶ 14). However, the amended complaint itself continues to assert that "Neither the Defendant McBride nor the Defendant Scholz issued any similar notice or violation or suspension to any other business located on the premises even though every other business located at the premises was experiencing similar problems." (Am. Compl., p. 4, ¶ 23). This factual dispute cannot be resolved on a motion to dismiss.

Section 1983 Due Process Claim

The motion to dismiss the due process claim is granted.

Plaintiff alleges that "Defendants' actions, in ordering only the Plaintiff's business to close deprived Plaintiff of its right to due process of law . . . ." (Am. Compl. ¶ 33.) I construe this claim as alleging that the temporary deprivation of plaintiff's license violated its right to substantive due process.[4]

To prevail on this claim, plaintiff must establish that defendants' suspension of the license was arbitrary and irrational in that it lacked a legitimate basis. See Crowley v. Courville, 76 F.3d 47, 52 (2d Cir. 1996) (government decision violates substantive due process when there is no legitimate reason for decision); Lowrance v. Achtyl, 20 F.3d 529, 537 (2d Cir. 1994) ("Substantive due process protects individuals against government action that is arbitrary . . . conscience-shocking . . . or oppressive in a constitutional sense . . . but not against government action that is 'incorrect or ill-advised'. . . . ") (citations omitted). The amended complaint alleges that the conditions at Keeper's were in violation of the public health laws, a lawful reason for suspending its license under the license's express terms.[5]

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[4] Plaintiff does not allege that it was deprived of any procedural safeguards.

[5] To the extent plaintiff alleges that the action was (continued...)

Qualified Immunity

On the present state of the record, defendants are not entitled to dismissal based on qualified immunity. A public official is entitled to immunity if the challenged action did not violate clearly established statutory or constitutional rights; or (2) a reasonable official could have thought the action was lawful. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). At the time of the events in question, it was clearly established that selective enforcement of a facially valid law based on an official's dislike of protected expression is unlawful. See LaTrieste Rest. & Cabaret Inc., 40 F.3d at 587; see also Brady v. Town of Colchester, 863 F.2d 205, 217 (2d Cir. 1988) (rejecting qualified immunity defense in case alleging selective enforcement of zoning laws based on political animus).

CONCLUSION

Accordingly, plaintiff's motion to file an amended complaint is hereby granted, defendants' motion to dismiss is granted in part and denied in part, the § 1985 claim is dismissed, and the § 1983 due process claim is also dismissed. This leaves the § 1983 First Amendment and Equal Protection claims.

So ordered.

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[5](...continued)
arbitrary in that other businesses also in violation of the public health code were not shut down, its substantive due process claim is merely duplicative of its equal protection claim. See Terminate Control Corp. v. Horowitz, 28 F.3d 1335, 1351 n.8 (2d Cir. 1994).

Entered in Hartford, Connecticut, this 15th day of March 2004.

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Robert N. Chatigny
United States District Judge