Case No. 18-30327

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GRIGSBY & ASSOCIATES, INCORPORATED,

Plaintiff – Appellant

v.

CITY OF SHREVEPORT; OLIVER JENKINS; MICHAEL CORBIN; JEFF EVERSON; TERRI ANDERSON-SCOTT; JULIE GLASS

Defendants – Appellees

Appeal from the United States District
Court for the Western District of Louisiana
USDC No. 5:14-CV-2340

BRIEF OF APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for defendant-appellee, the City of Shreveport, in the case styled *Grigsby & Associates, Inc. v. City of Shreveport et al.*, Case No. 18-30327, certifies pursuant to Fifth Circuit Rule 28.2.1 that the following persons and entities have an interest in the outcome of this appeal:

1. Grigsby & Associates, Inc., plaintiff-appellant;
2. Calvin Grigsby, counsel for plaintiff-appellant;
3. Raymond Lee Cannon, counsel for plaintiff-appellant;
4. the City of Shreveport, defendant-appellee;
5. John C. Nickelson, counsel for defendant-appellee, the City of Shreveport;
6. Oliver Jenkins, defendant-appellee;
7. Michael Corbin, defendant-appellee;
8. Jeff Everson, defendant-appellee;
9. Edwin H. Byrd, III, counsel for defendants-appellees, Oliver Jenkins, Michael Corbin, and Jeff Everson;
10. Terri Anderson-Scott, defendant-appellee;
11. Julie Glass, defendant-appellee; and
12. Julie Mobley Lafargue, counsel for defendants-appellees, Terri Anderson Scott and Julie Glass.

/s/ John C. Nickelson

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STATEMENT REGARDING ORAL ARGUMENT

The City of Shreveport and the other appellees do not request oral argument because it would not aid the Court's decisional process, as this appeal requires consideration of only a limited record and raises no novel issues of law.

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JURISDICTIONAL STATEMENT

The district court, exercising jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1367, entered judgment dismissing the claims of plaintiff-appellant Grigsby & Associates, Inc., on February 14, 2018. ROA.1155. Grigsby & Associates filed a timely notice of appeal on March 9, 2018. ROA.1156. This Court has jurisdiction under 28 U.S.C. § 1291.

SUMMARY OF THE ARGUMENT

The district court's judgment dismissing Grigsby & Associates' complaint with prejudice was not error, and this Court should affirm the judgment for the reasons adopted by the district court. All the claims in the complaint which arise from events that allegedly occurred more than one year before the filing of the complaint on July 19, 2014, other than the state law breach of contract claim, are time-barred. The City Council defendants—Oliver Jenkins, Michael Corbin, and Jeff Everson—have absolute immunity from Grigsby & Associates' federal claims against them, all of which relate to their legislative actions as members of the Shreveport City Council. The City Council defendants and the City Attorney defendants—Terri Anderson-Scott and Julie Glass—have qualified immunity from the company's federal claims against them because Grigsby & Associates' conclusory allegations concerning a vast discriminatory conspiracy are both implausible and insufficient to establish violation of any clearly established constitutional right. Dismissal of Grigsby & Associates' request for an injunction of the City's state court suit was proper given the insufficiency of the complaint's allegations to support a plausible section 1983 claim. Finally, the laundry list of state law claims Grigsby & Associates asserts against the City and the individual defendants all fail to state a claim for relief that is plausible on the face of the complaint. This Court should not disturb the judgment below.

ARGUMENT

I. Standard of Review and Pleading Standards

This Court reviews *de novo* a district court's grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Atchafalaya Basinkeeper v. Chustz*, 682 F.3d 356, 357 (5th Cir. 2012). When considering a motion to dismiss under Rule 12(b)(6), a court may rely upon "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008). "Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to [its] claim." *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000) (citations and internal quotation marks omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "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." *Iqbal*, 556 U.S. at 678. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

II. Federal Law Claims

A. Grigsby & Associates' federal claims arising from events that occurred more than one year before the filing of its complaint are time-barred.

The district court erred in accepting Grigsby & Associates' argument that the "catchall" four-year statute of limitations set forth in 28 U.S.C. § 1658(a), rather than a one-year statute of limitations, applies to all its claims under 42 U.S.C. §§ 1981, 1983 and 1985. "[A] cause of action 'aris[es] under an Act of Congress enacted' after December 1, 1990—and therefore is governed by § 1658's [four-year] statute of limitations—if the plaintiff's claim against the defendant was made possible by a post-1990 enactment." *Mitchell v. Crescent River Port Pilots Ass'n*, No. 07-30525, 265 F. App'x 363, 367 (5th Cir. Feb 14, 2008) (quoting *Jones v. R.R. Donnelley & Sons, Co.*, 541 U.S. 369, 382 (2004)). Section 1981 was amended in 1991, but even before that amendment, the statute "provided two rights: protection against the refusal to enter into a contract with someone on the basis of race and protection against racial discrimination that infects the legal process in ways that prevent one from enforcing contractual rights." *Mitchell*, 265 F. App'x at 368. The pre-1991 version of section 1981 also entitled all persons within the jurisdiction of the United States to "the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens" and provided that all such persons "shall be subject to like punishment, pains, penalties, taxes, licenses,

and exactions of every kind, and to no other." *See* 42 U.S.C. § 1981. The 1991 amendment expanded the statute's scope to include the "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *See* Pub. L. 102–166, 105 Stat. 1071.

The complaint at issue here contains no allegation that the City failed to perform its obligations under its contract with Grigsby & Associates—to the contrary, the complaint recognizes that the company was paid in full for its services. Nor does the complaint allege the City of Shreveport modified the contract, or that Grigsby & Associates was denied the enjoyment of any specific benefit, privilege, term, or condition of the parties' contract relationship. Instead, the complaint alleges that the City of Shreveport and the individual defendants committed a host of extra-contractual torts in the course of investigating Grigsby & Associates' performance and billing practices, enacting legislation concerning future payments to and contracts with financial advisors, and filing suit in state court to recover an overpayment made to the company. Notwithstanding the district court's contrary holding, Grigsby & Associates' claims were not "made possible by" the 1991 amendment of section 1981 and therefore do not fall under the four-year statute of limitations set forth in section 1658(a).

Grigsby & Associates also argued before the district court that its allegations of "cumulative, continuous acts constituting tort claims" requires application of the continuing tort exception to extend the applicable prescriptive periods. Precedent forecloses this argument. *See, e.g.*, *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 279 (5th Cir. 2004) ("[D]iscrete discriminatory acts are not actionable is time barred, even when they are related to acts alleged in timely filed charges . . . Each discrete discriminatory act starts a new clock for filing charges alleging that act." (internal quotation marks and citation omitted)); *see also Mitchell*, 256 Fed. App'x at 369 (noting that "discrete acts" include "termination, failure to promote, denial transfer, or refusal to hire" in the employment context). Grigsby & Associates' claims are thus time-barred to the extent they relate to events that allegedly occurred more than one year prior to the filing of its petition.

B. Absolute immunity bars Grigsby & Associates' federal claims against the City Council defendants.

The Supreme Court held in *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), that local legislators have absolute immunity from suit for their legislative activities, and the Court has long recognized that this immunity extends to legislators' staff. *See, e.g. Gravel v. United State*s, 408 US. 606 (1972); *see also Reeder v. Madigan*, 780 F.3d 799 (7th Cir. 2015). This immunity attaches to all actions taken in the "sphere of legitimate legislative activity" and all "integral steps in the legislative process." *Bogan*, 523 U.S. at 45. "Whether an act is legislative turns on the nature of the act

itself, rather than on the motive or intent of the official performing it." *Id.*; *see also Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) ("[I]t simply is 'not consonant with our scheme of government for a court to inquire into the motives of legislators.'") (citation omitted).

Throughout its complaint, Grigsby & Associates generically alleges that the City Council defendants acted with discriminatory intent and malice, but the actions of which it complains, including their votes in favor of the ordinances and resolutions referenced in the complaint, were all legislative activities. *See, e.g.*, *Craig v. Police Jury Parish*, 265 F. App'x 185, 192 (5th Cir. 2008) (recognizing that a police jury's actions in "of receiving a complaint from a resident, discussing the issue at a meeting, holding a public hearing on the issue, and passing an ordinance were integral steps in the legislative process"); *see also Bogan*, 523 U.S. at 55 ("Most evidently, petitioner Roderick's acts of voting for an ordinance were, in form, quintessentially legislative."). The district court correctly held that the City Council defendants have absolute immunity from Grigsby & Associates' federal claims for damages. ROA.1139-1141.

C. Qualified immunity bars Grigsby & Associates' federal claims against all the individual defendants.

To avoid dismissal under Rule 12(b)(6), "[p]laintiffs who invoke § 1983 must plead specific facts that, if proved, would overcome the individual defendant's immunity defense; complaints containing conclusory allegations, absent reference

to material facts, will not survive . . . ." *Jackson v. City of Beaumont Police Dep't*, 958 F.2d 616, 620 (5th Cir. 1992). Qualified immunity is "an immunity from suit rather than a mere defense to liability." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The individual defendants named in Grigsby & Associates' complaint are entitled to qualified immunity for the reasons set forth in the district court's well-reasoned memorandum ruling, and Grigsby & Associates' contrary arguments are meritless. ROA.1141-1144. Specifically, Grigsby & Associates' first argument concerning qualified immunity is that the individual defendants "do not have the defense of Qualify Immunity based on objective legal reasonableness" because "their actions violate the City Charter." Appellant's Brief at p. 33. As the district court held, the actions of the City Attorney defendants in issuing a legal opinion to their client, and the actions of the City Council defendants in passing ordinances for the purpose of saving the City money, violated no constitutional right of Grigsby & Associates and in any event were objectively reasonable. ROA.1144. Grigsby & Associates' second argument concerning qualified immunity is that "Qualified Immunity must be asserted as a defense in a pleading not in a motion to dismiss." Appellant's Brief at pp. 34-35. This argument is wrong. *See, e.g.*, *Lincoln v. Turner*, 874 F.3d 833 (5th Cir. 2017) (affirming dismissal under Rule 12(b)(6) on qualified immunity grounds).

D. The district court did not err in dismissing Grigsby & Associates' claim for injunctive relief.

Grigsby & Associates concedes that its request for injunctive relief as to "amendments to the budget where the [City Council defendants] took over the executive power to hire and fire financial advisors since these amendments only lasted for one fiscal year," and it does not challenge the district court's dismissal of its claims for declaratory judgment concerning those budget amendments. Appellant's Brief at p. 47. Grigsby & Associates instead challenges only the district court's refusal to enjoin the City's state court suit, and its only supporting argument is that the Anti-Injunction Act does not apply to suits under 28 U.S.C. § 1983. Appellant's Brief at p. 48.

As the district court recognized, the Anti-Injunction Act provides that "[a] Court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Active Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283; *Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491, 499 (5th Cir. 1988) (en banc) ("Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." (citation omitted)). The City acknowledges that 42 U.S.C. § 1983 "is an Act of Congress that falls within the

'expressly authorized' exception" of the Anti-Injunction Act. *Mitchum v. Foster*, 407 U.S. 225, 243 (1972). Grigsby & Associates' complaint nonetheless fails to allege facts sufficient either to state a plausible claim under section 1983 relating to the City's state court suit or to establish (1) that it "will suffer irreparable injury if the federal court stays its hand, and (2) that it "does not have an adequate remedy at law in the state courts." *Duke v. State of Tex.*, 477 F.2d 244, 248 (5th Cir. 1973). "[T]he normal thing to do when federal courts are asked to enjoin pending proceedings in state court is not to issue such injunctions," and the allegations of Grigsby & Associates' complaint do not warrant deviation from the normal thing. *Id.* at 248 (quoting *Younger v. Harris*, 401 U.S. 37, 45 (1971)). The district court's judgment on this point accordingly was not error.

III. State Law Claims

A. Grigsby & Associates' non-contractual state law claims relating to events which occurred more than one year before the filing of its complaint are time-barred.

"A statute of limitations may support dismissal under Rule 12(b)(6) where it is evident from the plaintiff's pleadings that the action is barred and the pleadings fail to raise some basis for tolling or the like." *Jones v. Alcoa, Inc.*, 339 F.3d 359, 366 (5th Cir. 2003). As the district court held, Grigsby & Associates' claims for fraud and unfair trade practices, as well as its defamation claims relating to statements allegedly made more than one year before the filing of its suit, are time-

barred. ROA.1144-46; *see also* La. Civ. Code art. 3492 ("Delictual actions are subject to a liberative prescription of one year."); La. R.S. 51:1409 (providing a one-year period to file suit for an unfair trade practice running from the time of the transaction which gave rise to the right of action). Grigsby & Associates does not challenge or even acknowledge the district court's prescription ruling in its principal brief and has therefore waived the issue. *See, e.g., United States. v. Green,* 964 F.2d 365, 371 (5th Cir. 1992).

B. Grigsby & Associates' complaint does not allege facts sufficient to support a reasonable inference that it is entitled to relief on its state law claims.

1. Breach of contract

The December 2007 contract between the City and Grigsby & Associates allowed the City to terminate work under the contract at any time without cause. ROA.778. Grigsby & Associates does not allege in its complaint that the City breached the contract by failing to pay the company for its services. Instead, it alleges that the City and the individual defendants breached the contract by suing Grigsby & Associates in the First Judicial District Court of Caddo Parish, Louisiana to recover an overpayment of $53,450.17 the City made to the company. ROA.29. Grigsby & Associates also alleges that the City and the individual defendants "constructively terminated" the contract. ROA.46.

As the district court held, these allegations fail to state a claim for breach of contract for three reasons. First, the individual defendants are not parties to the contract and cannot be held personally liable for its breach. Second, the City's filing of a lawsuit in state court to recover overpayments to Grigsby & Associates is not a breach of any obligation the City has under the contract, however stridently Grigsby & Associates may disagree with the allegations supporting the City's claim. Third, the parties' contract expressly provides that the City can terminate work under the contract at any time without cause. Given this provision, any termination of the contract was not and could not have been a breach of the contract. ROA.1146-47. Grigsby & Associates' conclusory argument that "[n]umerous violations of the [City] Charter, resulting breach of contract and the violation of good faith and fair dealing and other requirements of State contract law, have been pled in detail" is unpersuasive. Appellant's Brief at p. 44.

2. Fraud

Grigsby & Associates' complaint alleges that City Attorney Terri Anderson-Scott and Assistant City Attorney Glass committed fraud by advising the City Council of their opinion that Grigsby & Associates had overcharged the City for its services. ROA.36-37. Louisiana Civil Code Article 1953 defines fraud as "a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the

other" and recognizes that "[f]raud may also result from silence or inaction." In order to succeed on a fraud claim, a plaintiff must prove the following elements: "(1) a misrepresentation, suppression, or omission of true information; (2) the intent to obtain an unjust advantage or to cause damage or inconvenience to another; and (3) the error induced by a fraudulent act must relate to a circumstance substantially influencing the victim's consent to (a cause of) the contract." *Williams v. Interstate Dodge Inc.*, 34 So.3d 1151, 1155–56 (La. App. 2d Cir. 2010). The complaint does not allege that Ms. Scott or Ms. Glass misrepresented or suppressed any fact; instead, it alleges that while serving as counsel to the City, they provided a legal opinion to the City (their client) that Grigsby & Associates (an adverse party) had overbilled the City for its services. As the district court held, these allegations do not state a claim for fraud. ROA.1148-49.

3. Defamation

"Four elements are necessary to establish a defamation cause of action: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault (negligence or greater) on the part of the publisher; and (4) resulting injury." *Costello v. Hardy*, 864 So.2d 129, 139 (La. 2004). Grigsby & Associates alleges that ordinances, resolutions, and public statements for which the individual defendants were responsible contained false information regarding the company. Even if almost all Grigsby & Associates' defamation claims were not

time-barred, absolute legislative immunity nonetheless would have required their dismissal. *See, e.g.*, La. R.S. 19:50 ("There shall be no prosecution for defamation . . . [w]hen a statement is made by a legislator or judge in the course of his official duties."); *see also Martin v. State*, 109 So.3d 442, 448 (La. App. 2d Cir. 2013) (recognizing the applicability of absolute legislative privilege to civil defamation claims); *Waste Management of Louisiana, L.L.C. v. Consolidated Garbage Dist. No. 1 of Parish of Jefferson*, 113 So.3d 243, 250 (La. App 5th Cir. 2013) (discussing the legislative immunity established by La. Const. of 1974, art. III, § 8, and holding that "[t]he thought processes of local legislators are off-limits to litigation and the courts").

The only specific statement that Grigsby & Associates alleges the defendants to have made less than one year before the filing of its complaint on July 19, 2014 is the allegation in the City's state court petition that "[t]he City overpaid Grigsby under the Contract in connection with the Erroneous Invoice in the amount of FIFTY-THREE THOUSAND FOR HUNDRED FIFTY AND 17/100 ($53,450.17) DOLLARS." ROA.44. This statement, which conveys that Grigsby & Associates issued an "erroneous invoice," is not defamatory. *See Costello*, 864 So.2d at 140 ("Defamatory words are, by definition, words which tend to harm the reputation of another so as to lower the person in the estimation of the community, to deter others from associating or dealing with the person, or otherwise expose a person to

contempt or ridicule."). None of the individual defendants named in Grigsby & Associates' complaint was the publisher of the statement. And the allegation that the statement was made with malice or other fault is not plausible given Grigsby & Associates' acknowledgment in its complaint that the statement reflects the opinions of the City Attorney, the Assistant City Attorney, and LaBorde & Neuner, an independent law firm. For these reasons, and those set forth in the district court's memorandum ruling, its judgment dismissing Grigsby & Associates' defamation claims was not error. ROA.1150-51.

4. Unfair Trade Practices

The district court correctly held that Grigsby & Associates' complaint fails to state a claim under the Louisiana Unfair Trade Practices Act ("LUTPA"). ROA.1149-50. "LUTPA provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" are unlawful. La. R.S. § 51:1405(A). To recover damages a plaintiff must prove fraud, misrepresentation or other unethical conduct. *Computer Management Assistance Co. v. Robert F. DeCastro, Inc.,* 220 F.3d 396, 404 (5th Cir. 2000). A trade practice is "unfair under the statute only when it offends established public policy and is immoral, unethical, oppressive or unscrupulous." *Cheramie Services, Inc. v. Shell Deepwater Production, Inc.,* 35 So.3d 1053, 1059 (La. 2010). The determination of what qualifies as "unfair trade practice" is largely left to the courts on a case by case

basis. *Turner v. Purina Mills, Inc.*, 989 F.2d 1419, 1422 (5th Cir. 1993) (citation omitted). Grigsby & Associates' complaint fails "to allege facts that would constitute fraud, misrepresentation or unethical conduct by the Defendant; rather, [Grigsby & Associates] has alleged merely conclusory allegations couched as factual allegations that the Defendants took part in some elaborate scheme to defraud [Grigsby & Associates]." ROA.1150. The LUTPA claim is thus both prescribed and wholly unsupported by the factual allegations required to avoid dismissal.

5. Malicious Prosecution

The City sued Grigsby & Associates in the First Judicial District Court of Caddo Parish, Louisiana on February 14, 2014 to recover a $53,450.17 overpayment for the company's services. The City's state court petition sets forth the basis of the City's claim against Grigsby & Associates but does not disparage the company in any way. ROA.895-901. Grigsby & Associates nonetheless alleges that the City and the individual defendants are liable for malicious prosecution under Louisiana Civil Code article 2315. ROA.43-47. "Actions for malicious prosecution are disfavored and a clear case must be established." *Graham v. Foret*, 818 F. Supp. 175, 177 (E.D. La. 1992) (citing *Jones v. Soileau*, 448 So.2d 1268 (La. 1984)). The elements of a malicious prosecution claim under Louisiana law are: (1) the commencement or continuance of original criminal or civil judicial proceedings; (2) legal causation by the present defendant in the original proceeding; (3) its bona fide

termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; and (6) damages conforming to legal standards resulting to plaintiff. *Jones*, 448 So.2d at 1271. Grigsby & Associates' complaint does not allege bona fide termination of the City's suit, and it is a matter of public record that the suit was pending when the district court issued the judgment at issue in this appeal. For this reason, as the district court held, Grigsby & Associates' complaint fails to state a claim for malicious prosecution. ROA.1152. Grigsby & Associates does not argue to the contrary in its principal brief.

CONCLUSION

For the reasons set forth above, this Court should affirm the district court's judgment dismissing the claims of plaintiff-appellant Grigsby & Associates, Inc., with prejudice.

Respectfully submitted,

/s/ John C. Nickelson

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CERTIFICATE OF SERVICE

I certify that on July 13, 2018, I filed the foregoing brief through the Court's CM/ECF system, which will serve them on the following counsel in the manner described in Fifth Circuit Rule 25.2.5:

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/s/ John C. Nickelson

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because the brief contains 5166 words. I further certify that the brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(5) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 in 14-point Times New Roman font.

/s/ John C. Nickelson

John C. Nickelson

CERTIFICATE

I certify as required by the Court's ECF Filing Standard that (1) the foregoing brief contains no information subject to redaction under 5th Cir. R. 25.2.13; (2) I will provide exact copies of the brief in paper form, should the Court request them; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses to the best of my knowledge.

/s/ John C. Nickelson

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