IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

MILTON JOHNSON, Cross-Claimant, v. BRYAN F. RUSS, JR., Cross-Defendant.	§ § § § § § § § §	6:16-cv-284-RP

ORDER

Before the Court is the Motion for Summary Judgment, (Dkt. 27), filed by Cross-Defendant Bryan F. Russ, Jr. ("Defendant" or "Russ"). After reviewing the briefing, the facts, and the relevant case law, the Court orders that Defendant's Motion for Summary Judgment is **DENIED**.

BACKGROUND

The motion for summary judgment follows the Court's adoption of a Report and Recommendation, (Dkt. 19), submitted by United States Magistrate Judge Jeffrey C. Manske that, partially by incorporation of a prior Report and Recommendation, (Dkt. 16), denied Defendant's motion to dismiss with respect to Russ, but granted the motion with respect to Russ's law firm, which was accordingly dismissed from the case. This Court adopted the second Report and Recommendation, which was not objected to by either party. (Dkt. 20).

The claims brought by Cross-Claimant Milton Johnson ("Plaintiff" or "Johnson"), arise from an initiative petition submitted by Johnson to the City of Hearne, Texas. Johnson has alleged the following. Amid allegations of misappropriation of funds by City of Hearne officials, city residents, including Johnson, gathered signatures for a petition aimed at requiring a forensic audit of city finances. (First Am. Compl., Dkt. 17-1, ¶ 4). After collecting 517 signatures in support of the petition, Johnson and his fellow organizers submitted the signatures to the city clerk on March 21,

2016. (*Id.* ¶ 5). It was the normal process for petitions to be submitted to the county elections administrator for verification. (*Id.*). However, Russ, in his position as city attorney, intercepted them before they could be forwarded to the county elections administrator of Robertson County for verification. (*Id.*). Russ held on to the signatures until April 7. (*Id.*). On April 8, the county elections administrator hand-delivered a letter to Russ informing him that there were only 318 signatures on the petition, 35 of whom were not registered voters. (*Id.* ¶ 7). This number (fewer than the 517 submitted by Russ and his fellow organizers), was insufficient to place an initiative on the ballot. (*Id.*) Russ did not share the information from the letter with the city council, Johnson, or any other petition organizers. (*Id.*). The cover sheet on the petitions stated that it contained 93 pages, but the county election administrator did not receive 93 pages. (*Id.*).

On April 6, 2016, the City of Hearne brought suit against Johnson for state-law claims, seeking a declaratory judgment that the petition was invalid. (City Compl., Dkt. 1-2, at 4). Plaintiff answered, adding Defendant and Defendant's law firm as cross-defendants and asserting claims against them for the violation of Johnson's constitutional rights under the First and Fourteenth Amendments pursuant to 42 U.S.C. § 1983. (Pl.'s Answer, Gen. Denial, Counter-Petition and Cross-Petition, Dkt. 1-2, at 13). Russ and his law firm removed the case to federal court. (Notice of Removal, Dkt. 1). The City of Hearne and Johnson have settled their claims, (Dkt. 5), and as discussed above, the law firm's motion to dismiss was granted. (Order Adopting Report and Recommendation, Dkt. 20, at 2).

LEGAL STANDARD

Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil Procedure "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby,*

Inc., 477 U.S. 242, 254 (1986). "A fact issue is 'material' if its resolution could affect the outcome of the action." *Poole v. City of Shreveport*, 691 F.3d 624, 627 (5th Cir. 2012) (citation omitted).

The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "[T]he moving party may [also] meet its burden by simply pointing to an absence of evidence to support the nonmoving party's case." *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 544 (5th Cir. 2005). The burden then shifts to the nonmoving party to establish the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585–87 (1986); *Wise v. E.I. Dupont de Nemours & Co.,* 58 F.3d 193, 195 (5th Cir. 1995). "After the non-movant has been given the opportunity to raise a genuine factual issue, if no reasonable juror could find for the non-movant, summary judgment will be granted." *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 174 (5th Cir. 2000). The Court views the evidence "in the light most favorable to the non-movant" and draws "all reasonable inferences in the non-movant's favor," *Brewer v. Hayne*, 860 F.3d 819, 821 (5th Cir. 2017), but "a party opposing summary judgment may not rest on mere conclusory allegations or denials in its pleadings." *Smith v. Reg'l Transit Auth.*, 827 F.3d 412, 417 (5th Cir. 2016) (quoting *Hightower v. Tex. Hosp. Ass'n*, 65 F.3d 443, 447 (5th Cir. 1995)).

DISCUSSION

The Report and Recommendation adopted by this Court without objection found that Johnson adequately pleaded violations of his First Amendment and 14th Amendment rights. (Report and Recommendation, Dkt. 16, at 4, 7–10). To defeat summary judgment, Johnson must show that, with all inferences drawn in his favor, there is sufficient evidence supporting these legal claims to allow a reasonable jury to rule in his favor. He has done so here.

I. First Amendment Violation

The Court addresses Johnson's legal arguments in support of his First Amendment claim, as upheld in the denial of Russ' motion to dismiss, and then goes on to discuss the facts Johnson has shown in support of allowing the case to be presented to a jury.

A. First Amendment Claim

As found in the denial of Russ' motion to dismiss, Johnson has alleged adequately that his First Amendment right to petition the government was violated. The circulation of initiative petitions is protected by the First Amendment as applied to states by the Fourteenth Amendment; this right has been labeled core political speech by the Supreme Court. *Meyer v. Grant*, 486 U.S. 414, 420–21 (1988). The Court found that Johnson's allegation that Russ, acting in his capacity as City Attorney for the City of Hearne, intercepted his petition, withheld signatures of the petition from the county election administrator, and did not disclose a letter from the county election administrator notifying him that there were insufficient signatures, sufficiently alleges a violation of Johnson's First Amendment right. (Report and Recommendation, Dkt. 16, at 8–9).

B. First Amendment Evidence

Russ contends that he did not violate Johnson's First Amendment rights because Russ did not intercept the petition at issue or conceal the letter he received from the county election administrator regarding the insufficient number of signatures on Johnson's petition. (Def.'s Mot. Summ. J., Dkt. 27, ¶ 22,).[1] Russ says that he could not have possibly intercepted the petition because the City Council held a meeting to discuss the petition on March 28, 2016. (*Id.* ¶ 21 (citing Notice of March 28 City Council Meeting, Dkt. 27-2)). It is Johnson's contention that Russ submitted some petition signatures to the elections administrator on April 7, and did not provide the

[1] In the concealment section of his summary judgment brief, Russ includes an argument about how even if he had concealed the letter, it would not have caused the violation Johnson alleges. This contention is taken up in the section on causation, *infra*.

remaining signatures until April 27. The fact that the City Council held a meeting on March 28, 2016, at which it voted to authorize a lawsuit challenging the petition's validity, (March 28 City Council Meeting Minutes, Dkt. 27-5), does not necessarily preclude Johnson's contention that Russ did not deliver the petition to the county election administrator until April 7, or the remaining signatures until April 27. It is entirely possible for a reasonable factfinder to draw the inference, based on the evidence available here, that Russ provided a copy of the petition to the City Council on March 28, but did not provide a complete version, with all of the signatures, to the county election administrator until April 27. In fact, the minutes make clear that Russ was present at the City Council meeting. (*Id.* (listing "Bryan Russ Jr, [sic] City Attorney" as present at the meeting and stating that "City Attorney Russ discussed the options under the charter to deal with the petition")). He could have given the petition to the City Council without having delivered it to the county elections administrator.

Johnson points to evidence suggesting that Russ submitted the petition and its accompanying signatures belatedly. The deposition of Trudy Hancock, the county election administrator for Robertson County at the time, is illustrative. Hancock testified that Russ submitted the signatures collected by Johnson on April 7, and then followed up with the additional signatures on April 27. (Hancock Dep., Dkt. 32-7, at 10–11). Johnson also shows evidence that Russ concealed an April 8 letter from the county administrator notifying him that there was an insufficient number of signatures on the petition. The Declaration of Shirley Harris,[2] who was a member of the Hearne City Council at the time, indicates that, regarding the letter from county election administrator Hancock to Russ, "Mr. Russ never shared Ms. Hancock's letter with the city council, even though he knew I was one of the petition organizers. If he had shared Ms. Hancock's letter with the council, I would have asked why he did not submit all of the signatures for verification." (Harris Decl., Dkt.

[2] Russ objects to paragraph 2 of the Harris Declaration. Because the Court need not consider this paragraph for the purposes of this order, the Court does not rule on the objection at this time.

32-1, ¶ 3). Additionally, Trudy Hancock testified in her deposition that Russ told her that she did not need to inform the City Council about additional signatures submitted. (Hancock Dep., Dkt. 32-7, at 12–13).

Therefore, there is a genuine dispute as to whether Russ intercepted the petition, withheld a portion of the signatures to the petition, and concealed a letter from the county administrator notifying him that the number of signatures was insufficient. A reasonable jury could infer from the facts presented that these things all happened, and if the jury did so find, the facts would constitute a violation of Johnson's First Amendment right to petition. Summary judgment is improper.

II. Equal Protection Violation

As with the First Amendment claim, the Court here first addresses Johnson's legal arguments in support of his First Amendment claim as upheld in the denial of Russ' motion to dismiss. The Court then turns to the evidence Johnson has put forth in support of those claims.

A. Equal Protection Claim

Johnson's equal protection claim is derivative of his First Amendment claim. Johnson alleges that Russ' interception of the petition and signatures, as well as his failure to tell the City Council or Johnson about a letter Johnson received from the county election administrator regarding the insufficient number of signatures on the petition, violate his right to equal protection under the Fourteenth Amendment. (First Am. Compl., Dkt. 17-1, ¶ 9). His particular claim, of selective enforcement of a law (sometimes referred to as a "class-of-one" claim), requires a plaintiff to show that (1) "she has been intentionally treated differently from others similarly situated" and (2) "there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Selective enforcement equal protection claims not related to zoning restrictions must meet a particular intent requirement; plaintiffs must show that "the government official's acts were motivated by improper considerations, such as race, religion, or the desire to prevent the exercise of

a constitutional right." *Knapp v. U.S. Dep't of Agriculture*, 796 F.3d 445, 467 (5th Cir. 2015) (quoting *Bryan v. City of Madison*, 213 F.3d 267, 277 (5th Cir. 2000)). Here, the improper consideration alleged was the desire to prevent Johnson from exercising his First Amendment right to petition.

In denying Russ' motion to dismiss, the Court concluded that Johnson's pleadings satisfied all three requirements. (Report and Recommendation, Dkt. 16, at 5–6, *adopted by* Order, Dkt. 20). Russ adequately alleged that (1) he was treated differently from others situated similarly because normally initiative petitions are sent to the county administrator rather than being intercepted by the city attorney; (2) the difference in treatment had no rational basis because there is no rational reason for a city attorney to withhold petitions from the county election administrator; and (3) he showed the requisite improper motive because that motive was to prevent Johnson from exercising his constitutional right to petition the government. (*Id.*). At the summary judgment stage, Russ cannot merely reassert his old legal arguments about the insufficiency of Johnson's pleading; he must point to an absence of genuine dispute as to a material fact in support of Russ's equal protection claim. He has failed to do so here.

B. Equal Protection Evidence

Russ contends that Johnson has failed to provide adequate evidence on two elements of the equal protection claim: (1) differential treatment and (2) discriminatory purpose.

1. Differential Treatment

Russ restates his previously discussed assertion, to no avail, that Russ did not hide or intercept the petition, in support of the claim that he did not receive differential treatment. Because the Court has found that a genuine dispute exists as to this point, it will not grant summary judgment on this ground.

He also asserts a different argument relating to differential treatment: that there are no similarly situated individuals to compare with Johnson. Johnson cannot have been treated differently

if no one else was in the same position as him. To support this argument, Russ notes that Johnson has identified no other individual who filed an initiative petition with the City of Hearne, and that Johnson has only identified someone who filed a recall petition, which has different procedures. This asks the Court to define the class of people being treated too narrowly. Johnson has pointed to evidence from Anna Florida, the former Hearne City Secretary, Trudy Hancock, the former county election administrator, and Russ, that it was the past practice to submit petitions received by the city secretary to the county election administrator. (Pl.'s Resp. Mot. Summ. J., Dkt. 32, at 3 (citing Florida Dep., Dkt. 32-5, at 6–8; Hancock Dep., Dkt. 32-7, at 6–8; Russ Dep., Dkt. 32-10, at 6–7)). Therefore, summary judgment on this ground would also be improper.

2. Improper Discriminatory Purpose

Russ additionally contends that Johnson has failed to point to any evidence demonstrating discriminatory intent. Johnson's class-of-one Equal Protection claim, as articulated in the first Report and Recommendation, (Dkt. 16, at 5), subsequently adopted (as incorporated into the second Report and Recommendation) by the Court without objection from Russ, (Dkt. 20), does point to evidence that could give rise to an inference of such intent.

Here, Johnson has alleged that Russ treated him differently from other similarly situated submitters of petitions for the purpose of preventing Johnson from exercising his First Amendment right to petition, as set forth in the First Amendment section of this order. And Johnson has pointed to evidence that could give rise to an inference of such intent. The same evidence proffered in support of Johnson's First Amendment claim also serves to provide an inference that could be made by a reasonable jury that he did so intentionally, for the purpose of depriving Johnson of his First Amendment right to petition. The Declaration of former City Council member Shirley Harris provides evidence that Johnson did not notify the City Council of the letter from the county election administrator about the insufficient number of signatures accompanying the petition. (Harris Decl.,

Dkt. 32-1, ¶ 3 ("Mr. Russ never shared Ms. Hancock's letter with the city council, even though he knew I was one of the petition organizers.")). The deposition of county election administrator Trudy Hancock provides evidence that Russ told her that she did not need to inform the City Council of additional signatures submitted belatedly. (Hancock Dep., Dkt. 32-7, at 12–13).

Russ is correct that a jury need not come to the same conclusion as Harris did, that "Mr. Russ withheld Ms. Hancock's letter from the council because he did not want anyone to learn about the missing signatures," or that "Mr. Russ was trying to deceive the council and the public about the number of signatures on the petitions." (Def.'s Reply Mot. Summ. J., Dkt. 33, at 8 (quoting Harris Decl., Dkt. 32-1, ¶¶ 3, 5)). However, a reasonable jury could draw inferences leading to that conclusion based on the facts provided by Johnson regarding Russ's interception of petition signatures and failure to notify (and even further, ensuring that Hancock did not notify) the City Council of the original number of petition signatures or the subsequent change in number of petition signatures received by Hancock. Therefore, summary judgment is not appropriate on this ground.

III. Qualified Immunity

Russ cloaks much of his summary judgment argument in the terminology of qualified immunity, but for the most part he simply attacks the evidentiary basis for Johnson's claims. Although all of his contentions regarding the sufficiency of evidence serving as the basis for Johnson's constitutional claims were addressed in Sections I and II, *supra*, he placed many of these contentions in the section of his brief labeled "Qualified Immunity." (Def.'s Mot. Summ. J., Dkt. 27, at 4). However, he has put forth no argument, aside from the factual disputes recounted above, for why the actions alleged (for which there is evidence to support) either (1) do not show a constitutional violation; or (2) do not represent a violation of clearly established law. Therefore, his qualified immunity argument, being no different from his factual argument, will not prevail.

Qualified immunity protects individuals acting in an official capacity on behalf of a government "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A two-step process is used to determine whether an individual is entitled to qualified immunity: (1) whether a constitutional right was violated; and (2) whether the constitutional right at issue was clearly established. *Saucier v. Katz*, 533 U.S. 194, 200 (2001). The Supreme Court subsequently overruled *Saucier*—which mandated the sequence in which to address the two steps—in part, finding that courts are free to take up the two prongs of the qualified immunity analysis in either order. *See Pearson v. Callahan*, 555 U.S. 223, 227 (2009) ("the *Saucier* procedure should not be regarded as an inflexible requirement").

Qualified immunity does not change the standard for summary judgment. Although the Supreme Court has indicated qualified immunity should ensure "that 'insubstantial claims' against government officials be resolved prior to discovery and on summary judgment if possible," *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987) (quoting *Harlow*, 457 U.S. at 818–19), the Court must still make all reasonable inferences in favor of the non-moving party. *See Tolan v. Cotton*, 134 S. Ct. 1861, 1867–68 (2014) (reversing the lower court's grant of summary judgment to a defendant on the basis of qualified immunity because the court "credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion").

Granting Russ's motion for summary judgment here would require departing from this principle. Russ has not put forward an argument that, if the facts alleged by Johnson are found to be true, the interception of an initiative petition and withholding of signatures in order to prevent the initiative from appearing on the ballot is somehow not a violation of a constitutional right that has been clearly established. As noted in the order denying Russ' motion to dismiss, Russ has not put

forth a compelling argument that he is entitled to qualified immunity on the basis of the facts at issue here.

IV. Causation

Russ puts forth two arguments to support his contention that he cannot be shown to have taken any action that caused the violation of Johnson's constitutional rights: (1) he did not intercept the petition and (2) he did not conceal the letter from county election administrator Hancock (and even if he had, it would not have been the cause of the initiative's failure to appear on the May ballot).[3] The first argument is simply a factual contention, and it has been sufficiently rebutted by Johnson to deny summary judgment on that ground. (*See supra* Section I.B.). The second argument, to the extent it contains a factual assertion, has also been sufficiently rebutted to preclude summary judgment. (*Id.*). The rest of the argument is a variant of an argument rejected in the original Report and Recommendation. (Report and Recommendation, Dkt. 16, at 8–9).

Russ says that, due to the mechanics of the Texas Election Code, the deadline for ordering a May election was February 19, 2016, which meant that Johnson's submission of the petition on March 21, 2016 could not have resulted in the proposed initiative's appearance on the May ballot. (Def.'s Mot. Summ. J., Dkt. 27, ¶ 52). However, this appears to be a straw man—Russ does not point to an instance of Johnson confining his claim to being deprived of a place on the May ballot. Even if Johnson was in fact too late to have his initiative appear on the May ballot, it would not prevent Johnson from getting the initiative on a future ballot, and it would make Johnson's claim no less viable.[4] Additionally, Johnson points to the fact that the City felt it necessary to initiate a lawsuit seeking a declaratory judgment that the petition was invalid; it is unclear why the City would do so if

[3] The third argument in the Causation section of Russ' brief simply repeats his arguments from earlier in the brief regarding Equal Protection, disposed of earlier in this order: that Johnson cannot show he was treated differently, that there are no similarly situation comparators, and that Johnson cannot show a discriminatory purpose.
[4] Defendant's suggestion that the claim is moot, raised for the first time in his Reply brief, is not compelling. The damage alleged by Johnson through interference with his constitutional rights remains.

the initiative had no chance of appearing on the ballot. (*See* Pl.'s Resp. Mot. Summ. J., Dkt. 32, at 4; City Compl., Dkt. 1-1).

CONCLUSION

For the foregoing reasons, Russ' Motion for Summary Judgment, (Dkt. 27), is **DENIED**.

SIGNED on October 26, 2017.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE