IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BILL KASPERS, *on behalf of himself and all other similarly-situated citizens, owners or co-owners of residences, and residents of the Derby Hills residential subdivision in Sandy Springs, Fulton County, Georgia* Plaintiff, v. VERIZON WIRELESS SERVICES, LLC, Defendant.	:	CIVIL ACTION NO. 1:20-cv-02142-LMM

ORDER

This matter is before the Court on Defendant Verizon Wireless Services, LLC's Motion to Dismiss [16]. After due consideration, the Court enters the following Order:

I. BACKGROUND

Plaintiff Bill Kaspers lives in a residential subdivision of Sandy Springs, Georgia known as Derby Hills. Dkt. No. [1] ¶ 1. Defendant, a provider of wireless cellular services, is in the process of installing "5G" network equipment in Plaintiff's subdivision. On March 27, 2020, an employee of a subcontractor performing this work for Defendant informed Plaintiff that the subcontractor

planned to install cellular transmission equipment on a pole that would be situated in Plaintiff's front yard. Id. ¶ 6. On March 30, 2020, the subcontractor returned to "the street in front of" Plaintiff's home, "accompanied by a uniformed officer from the Fulton County Sheriff's Department . . . ." Id. ¶ 7. Upon seeing these personnel, Plaintiff complained to the City Attorney for Sandy Springs, who sent a city official to instruct the subcontractor's employees to cease their activity. Id.

Plaintiff objects to the erection of a pole on his property and to the installation of 5G equipment on that pole. He alleges that: (1) 5G signals produce radiofrequency ("RF") emissions that cause numerous deleterious health conditions; (2) the installation of 5G transmission equipment on his yard and around his subdivision will place himself and his neighbors at risk of acquiring these conditions; (3) the danger posed by 5G RF emissions will reduce property values in his subdivision; and (4) Defendant failed to inform Plaintiff and other putative class members of these dangers. Id. ¶ 8–10.

Plaintiff filed this suit on May 19, 2020 and seeks to represent a class of similarly situated residents of his subdivision. Plaintiff's Complaint contains five counts: (1) "unlawful trespass and resulting property devaluation," (2) "unlawful taking of property and of the joy and benefits of home ownership under color of law," (3) "fraud," (4) "violation of Plaintiff's and the Plaintiff Class's rights under 42 U.S.C. § 1983," and (5) "intentional infliction of emotional distress." Id. ¶¶ 11–15. Defendant moved to dismiss Plaintiff's Complaint under Federal Rule of Civil

Procedure 12(b)(6). Dkt. No. [16]. Plaintiff responded, Dkt. No. [23], and Defendant replied, Dkt. No. [24]. Plaintiff subsequently moved for leave to file a surreply, Dkt. No. [25], which the Court granted as unopposed, Dkt. No. [26]. Defendant's Motion is now ripe for the Court's review.

II. LEGAL STANDARD

To withstand a Rule 12(b)(6) 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 complaint is plausible on its face when the plaintiff pleads factual content necessary for the court to draw the reasonable inference that the defendant is liable for the conduct alleged. Id. (citing Twombly, 550 U.S. at 556).

At the motion to dismiss stage, "all well-pleaded facts are accepted as true, and the reasonable inferences therefrom are construed in the light most favorable to the plaintiff." FindWhat Inv'r Grp. v. FindWhat.com, 658 F.3d 1282, 1296 (11th Cir. 2011) (quoting Garfield v. NDC Health Corp., 466 F.3d 1255, 1261 (11th Cir. 2006)). However, this principle does not apply to legal conclusions set forth in the complaint. Iqbal, 556 U.S. at 678.

III. DISCUSSION

Defendant argues Plaintiff's claims are entirely preempted, under both express and implied preemption principles, by the Telecommunications Act of 1996. Dkt. No. [16-1] at 12–22. Even if preemption does not apply, Defendant

argues, none of Plaintiff's five claims for relief are plausible. Id. at 22–28. Plaintiff counters that the Telecommunications Act preserves his right to bring his claims, and "no valid or lawfully enforceable" federal regulations otherwise have preemptive effect. Dkt. No. [23] at 15. Plaintiff further contends that Defendant's plausibility arguments misunderstand Georgia law. Id. at 20–24.

A. Preemption

Federal preemption of state law may be express or implied. Express preemption "arises when the text of a federal statute explicitly manifests Congress's intent to displace state law." United States v. Alabama, 691 F.3d 1269, 1281 (11th Cir. 2012). Implied preemption comes in multiple forms; the relevant variety here is conflict preemption, which "occurs either when it is physically impossible to comply with both the federal and the state laws or when the state law stands as an obstacle to the objective of the federal law." Fla. State Conf. of N.A.A.C.P. v. Browning, 522 F.3d 1153, 1167 (11th Cir. 2008) (citing Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372–73 (2000)). Defendant argues that Plaintiff's claims are both expressly and impliedly preempted by the Telecommunications Act of 1996. See Dkt. No. [16-1] at 11–22, 47 U.S.C. § 332(c)(7)(B)(iv). Plaintiff counters that the Tenth Amendment, as well as saving clauses in the Telecommunications Act and the Communications Act of 1934, permit him to bring his claims. Dkt. No. [23] at 13–14.

While the Telecommunications Act creates a federal regulatory structure for the provision of mobile communication services, § 332(c)(7) works to

"preserve[] 'the traditional authority of state and local governments to regulate the location, construction, and modification' of wireless communications facilities like cell phone towers . . . ." T-Mobile S., LLC v. City of Roswell, 574 U.S. 293, 300 (2015) (quoting Rancho Palos Verdes v. Abrams, 544 U.S. 113, 115 (2005)). Section 332(c)(7)(B)(iv), however, constrains state and local governments' authority by prohibiting them from "regulat[ing] the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions," as long as the facilities comply with the Federal Communications Commission's ("FCC") regulations of those emissions.

That constraint gives rise to implied preemption: § 332(c)(7)(B)(iv) entrusts the FCC—not state or local governments—to determine acceptable levels of RF emissions while disallowing state and local governments from supplementing or supplanting the FCC's determinations with their own. By prohibiting state and local governments from looking beyond the FCC's RF emissions standards, the Telecommunications Act "delegate[es] the task of setting RF-emissions levels to the FCC" and authorizes the agency "to strike the proper balance between protecting the public from RF-emissions exposure and promoting a robust telecommunications infrastructure." Robbins v. New Cingular Wireless PCS, LLC, 854 F.3d 315, 319–20 (6th Cir. 2018); see also, e.g., Farina v. Nokia Inc., 625 F.3d 97, 131 (3d Cir. 2010) (finding that, in the case of the Telecommunications Act, "the presence of state-law regulations [would] not

serve as a complement" to federal regulation, but would "re-balance[] the relevant considerations" left by Congress to the FCC); Bennett v. T-Mobile USA, Inc., 597 F. Supp. 2d 1050, 1053 (C.D. Cal. 2008) (holding that "Congress delegated authority to the FCC to create uniform rules for telecommunications," including rules relating to RF emissions exposure).

Numerous federal courts have held that § 332(c)(7)(B)(iv)'s delegation of regulatory authority to the FCC impliedly preempts state-law suits such as Plaintiff's—that is, suits that attack the placement, construction, and modification of personal wireless service facilities on RF emissions grounds when those facilities comply with the FCC's RF emissions regulations. By claiming that RF emissions deemed safe by the FCC nonetheless violate state law, state-law suits ask courts in essence "to second-guess the FCC's balance of its competing objectives." Farina, 625 F.3d at 134. "Allowing RF-emissions-based tort suits would upset that balance" and interfere with Congress's delegation of regulatory authority to the FCC.[1] Robbins, 854 F.3d at 320; see also Bennett, 597 F. Supp. 2d at 1053 ("To allow state claims such as these asserted by-Plaintiff to proceed would be to question the judgment of the FCC on the issue of RF emissions standards."); Jasso v. Citizens Telecomms. Co. of Cal., Inc., No. CIV S-05-2649 GEB EFB PS, 2007 WL 2221031, at *8 (E.D. Cal. July 30, 2007) ("Assuming

[1] State courts that have addressed the issue have reached the same conclusion. See Stanley v. Amalithone Realty, Inc., 940 N.Y.S.2d 65, 70 (N.Y. App. Div. 2012); Murray v. Motorola, Inc., 982 A.2d 764, 778 (D.C. 2009).

defendants were found to be in compliance with these FCC regulations, a determination that their operation of the facility . . . was 'ultrahazardous' would be in direct conflict with the FCC's regulations setting maximum, 'safe' levels of exposure."), adopted by, No. 2:05-cv-2649-GEB-EFB-PS, 2007 WL 2688837 (E.D. Cal. Sept. 13, 2007); Fontana v. Apple, Inc., 321 F. Supp. 3d 850, 854 (M.D. Tenn. 2018) (finding RF exposure-based challenge preempted because plaintiff "is directly attacking the adequacy of the RF exposure regulations. Congress has left that decision to the FCC, not the court or a jury.").

Counts One and Five of Plaintiff's Complaint invoke state-law causes of action to challenge the installation of a 5G pole and antenna. These claims stem from Plaintiff's allegation that "the toxic effects of the radiation waves emanating from a 5G cell unit" will harm him and other residents in his neighborhood. Dkt. No. [1] ¶ 9. Plaintiff does not allege that the unit on his property, or any other units, would precipitate "RF emissions exceed[ing] the maximum level set by the FCC," Robbins, 854 F.3d at 320; rather, he refers to "over one hundred studies, followed by over one hundred reports, relating to" the health risks of RF emissions generally, Dkt. No. [1] ¶ 11. Such studies, however, do not remove the preemptive effect of the FCC's RF emissions regulations. Because Counts One and Five of Plaintiff's Complaint interfere with the FCC's delegated regulatory authority in this area, they are preempted.

Plaintiff argues his claims escape preemption for three reasons: (1) savings clauses in the Telecommunications Act and Communications Act preserve state-

law remedies, Dkt. No. [23] at 14–15; (2) "there currently are no valid or lawfully enforceable FCC regulations or standards regarding the use of 5G technology," id. at 15; and (3) state and local authorities retain some power, under the Telecommunications Act, over the installation of wireless service facilities, id. at 18. Plaintiff supplements the latter argument with examples of Georgia state courts enforcing property rights and state takings law. Id. at 16–18.

Congress, in enacting the Telecommunications Act, "was clearly concerned with state-law RF standards applicable to infrastructure that threatened to limit the efficiency and uniformity of the wireless network." Farina, 625 F.3d at 132. Thus, interpreting the Act's saving clause to allow state-law tort suits challenging FCC-compliant wireless service facilities "could allow the law to 'defeat its own objectives.'" Id. at 131 (quoting Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 872 (2000)); cf. Geier, 529 U.S. at 870 (alterations omitted) (quoting United States v. Locke, 529 U.S. 89, 106 (2000)) ("[T]his Court has repeatedly 'decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.'"). The Communications Act's saving clause does not rescue Plaintiff's claims, either. It "applies generally, and as such, does not provide strong evidence of the congressional objectives bound up with the regulation of RF emissions." Farina, 625 F.3d at 132 n.30. As the Third Circuit recognized in Farina, Plaintiff's construction of the two Acts' saving clauses would allow de facto private enforcement of RF emissions

standards other than those promulgated by the FCC. Congress, however, left the task of setting those standards to the FCC.[2]

Next, Plaintiff is incorrect that there are no FCC regulations to preempt his claims. The FCC has, in fact, promulgated regulations governing RF emissions exposure. See RF Exposure, 47 C.F.R. § 27.52 (2020); Radiofrequency Radiation Exposure Limits, 47 C.F.R. § 1.1310 (2020). Plaintiff claims the current rules were promulgated in a procedurally deficient manner, but he misinterprets their history. On April 1, 2020, the FCC published these rules in the Federal Register in their final form, concluding a period of notice-and-comment rulemaking that began in 2013 with a Notice of Proposed Rulemaking.[3] See Human Exposure to Radiofrequency Electromagnetic Fields and Reassessment of FCC

[2] In Pinney v. Nokia, Inc., the Fourth Circuit held that "these savings clauses counsel against any broad construction of the goals of § 332 and § 332(c)(7) that would create an implicit conflict with state tort law." 402 F.3d 430, 458 (4th Cir. 2005). That case, however, concerned the emission of RF radiation from wireless telephones, not wireless communication infrastructure, and the court limited its analysis of congressional intent to the telephone context. Id. at 457–58. As the court noted, "§ 332 does not address the subject of wireless telephones, let alone the more specific issue of the permissible amount of RF radiation from wireless telephones." Id. at 457. However, § 332 squarely addresses infrastructure—such as the wireless transmission unit at issue here—and delegates regulatory authority to the FCC in that context. Pinney is therefore distinct from this and other like cases. See Fontana, 321 F. Supp. 3d at 855; Jasso, 2007 WL 2221031, at *8.

[3] This Notice of Proposed Rulemaking was also published in the Federal Register. See Reassessment of Exposure to Radiofrequency Electromagnetic Fields Limits and Policies, 78 Fed. Reg. 33654 (proposed June 4, 2013) (to be codified at 47 C.F.R. pts. 1, 2, 15, 18, 22, 24, 25, 27, 73, 90, 95, 97, & 101).

Radiofrequency Exposure Limits and Policies, 85 Fed. Reg. 18131, 18132 (Apr. 1, 2020) (to be codified at 47 C.F.R. pts. 1, 2, 15, 18, 22, 24, 25, 27, 73, 90, 95, 97, & 101). The final rules' June 1 effective date did not commence a public commenting period, as Plaintiff claims; they delayed the effectiveness of a rule that had been finalized after the notice-and-comment process prescribed by 5 U.S.C. § 553(c). See 5 U.S.C. § 553(d) (emphasis added) (providing, subject to exceptions not relevant here, that "[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date"). In short, Plaintiff has identified nothing that would render the FCC's rules procedurally defective or otherwise deprive them of preemptive effect.[4]

Finally, Plaintiff's assertion that state and local governments are not wholly foreclosed from regulating wireless service facilities is correct but inapposite. As noted, the Telecommunications Act generally preserves state and local regulatory authority with respect to the "placement, construction, and modification of personal wireless service facilities . . . ." 47 U.S.C § 332(c)(7)(B)(iv). Thus, state and local officials are largely free to make such decisions using "substantive standards . . . under established principles of state and local law." Preferred Sites,

[4] United Keetoowah Band of Cherokee Indians in Okla. v. FCC, 933 F.3d 728 (D.C. Cir. 2019), upon which Plaintiff extensively relies, is not to the contrary. There, the D.C. Circuit held that the FCC's decision to cease reviewing the environmental effects of the construction of "small cells" under the National Environmental Policy Act and National Historic Preservation Act was arbitrary and capricious. Id. at 740. The court did not pass upon the RF emissions regulations that form the basis for preemption here; those regulations had not yet been promulgated in their present form.

LLC v. Troup Cnty., 296 F.3d 1210, 1219 (11th Cir. 2002) (quoting Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d 490, 494 (2d Cir. 1999)). However, for the reasons stated above, the Act's clear proscription of state and local regulatory decisions made "on the basis of the environmental effects of radio frequency emissions"—to the extent those emissions conform to FCC regulations—extends to the RF emissions-related health concerns Plaintiff raises here. 47 U.S.C § 332(c)(7)(B)(iv); see also SPRINTCOM, Inc. v. P.R. Reguls. & Permits Administration, 553 F. Supp. 2d 87, 92 (D.P.R. 2008) ("Federal courts have repeatedly indicated that, so long as the facilities comply with the FCC's regulations concerning emissions, citizens' health concerns cannot constitute substantial evidence" in favor of prohibiting those facilities). That limitation preempts Plaintiff's state law claims based upon RF emissions-related health concerns. Accordingly, Counts One and Five of Plaintiff's Complaint are dismissed.

B. Rule 8

Plaintiff's Complaint contains three other claims: first, that Defendant has committed and will commit unlawful takings, Dkt. No. [1] ¶ 12; second, that Defendant committed fraud in connection with its attempted installation of 5G equipment, id. ¶ 13; and third, that Defendant's alleged transgressions give rise to

a claim under 42 U.S.C. § 1983, id. ¶ 14. Each fails to state a plausible claim for relief.

i. Unlawful Takings

Plaintiff avers that Defendant's actions amount to an "unlawful taking of property and of the joy and benefits of home ownership under color of law." Dkt. No. [1] at 14. The Complaint does not specify whether this is a claim under the Fifth Amendment's Takings Clause or the analogous provision in the Georgia Constitution. See U.S. Const. amend. V; Ga. Const. art. I, § 3, para. 1. This alone is grounds for dismissal. See Weiland v. Palm Beach Cnty. Sheriff's Office, 792 F.3d 1313, 1323 & n.15 (11th Cir. 2015) (stating that claims must "give the defendants adequate notice of the claims against them and the grounds upon which each claim rests"). But Plaintiff has not alleged facts sufficient to state a state or federal takings claim.

Under the federal and Georgia constitutions, a taking may occur when the government directly appropriates private property for public use, or when regulation of land is so restrictive that it amounts to a "regulatory taking." See generally Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992); Diversified Holdings, LLP v. City of Suwanee, 807 S.E.2d 876, 885–86 (Ga. 2017). Plaintiff's most fundamental problem is that Defendant is a private actor. Neither the federal nor the Georgia constitution "protect against injuries by purely private individuals—that is, individuals who cannot be considered as acting for state or local government." Howard v. Wal-Mart, 175 F. App'x 282, 283 (11th Cir. 2006).

However, even if Defendant was a state actor, Plaintiff has not alleged that any taking has yet occurred. He states that an employee of Defendant's subcontractor approached him at his door, Dkt. No. [1] ¶ 6, that the employee informed Plaintiff of his firm's intent to dig a hole in Plaintiff's yard, id., and that the subcontractor's personnel subsequently "appeared on the street in front of" Plaintiff's residence, id. ¶ 7. Separately, the Complaint adverts to the emission of RF radiation as a basis for a takings claim. See id. ¶ 12. These allegations concern only future harm. See Knick v. Twp. of Scott, 139 S. Ct. 2162, 2170 (2019) (emphasis added) ("The Fifth Amendment right to full compensation arises at the time of the taking . . . ."); Wright v. Metro. Atlanta Rapid Transit Auth., 283 S.E.2d 466, 468 (Ga. 1981) ("[J]ust and adequate compensation for the taking is determined as of the date of taking."). Even if Plaintiff had alleged past harm, he has pointed to no authority indicating that the emission of RF radiation can constitute a taking. For all these reasons, Plaintiff has failed to allege an actionable taking and Count Two of Plaintiff's Complaint is dismissed.

ii. Fraud

Here Plaintiff encounters a heightened pleading standard: "Plaintiffs alleging fraud must 'state with particularity the circumstances constituting fraud or mistake.'" Wilding v. DNC Servs. Corp., 941 F.3d 1116, 1127 (11th Cir. 2019) (quoting Fed. R. Civ. P. 9(b)). Rule 9(b) requires a plaintiff to allege "(1) the precise statements, documents, or misrepresentations made; (2) the time, place and person responsible for the statement; (3) the content and manner in which

these statements misled [him]; and (4) what the defendants gained by the alleged fraud." Am. Dental Ass'n v. Cigna Corp., 605 F.3d 1283, 1291 (11th Cir. 2010) (quoting Brooks v. Blue Cross & Blue Shield of Fla., Inc., 115 F.3d 1374, 1380–81 (11th Cir. 1997)). This pleading standard is applied to the elements of common law fraud, which in Georgia are "a false representation by a defendant, scienter, intention to induce the plaintiff to act or refrain from acting, justifiable reliance by plaintiff, and damage to plaintiff." Bowden v. Medical Ctr., Inc., 845 S.E.2d 555, 563 n.10 (Ga. 2020) (quoting Crawford v. Williams, 375 S.E.2d 223, 224 (Ga. 1989)).

Plaintiff alleges Defendant's "failure to inform and provide notice to" Plaintiff, members of the putative class, the City of Sandy Springs, Fulton County, the State of Georgia, and federal agencies "changed with the responsibility for protecting and safeguarding the health, livelihood and lives of America's citizens is nothing more than fraud at all levels for which Defendant Verizon should be held accountable." Dkt. No. [1] ¶ 13. Plaintiff argues this states a claim for "fraud by omission" because Defendant failed to warn him of the dangers of RF emissions from 5G facilities. Dkt. No. [23] at 23. Even assuming Defendant had a duty to inform the parties listed in the Complaint of the environmental effects of RF emissions, the Complaint contains no allegation of Defendant's intent to induce Plaintiff to act or refrain from acting, Plaintiff's justifiable reliance, or any damage Plaintiff has suffered. Accordingly, Count Three fails to state a claim for fraud and is dismissed.

iii. 42 U.S.C. § 1983

Next, Plaintiff claims he has a cause of action under 42 U.S.C. § 1983 because Defendant's actions "threaten[] to deprive Plaintiff" and putative class members "of their inalienable right to life, liberty and the pursuit of happiness . . . ." Dkt. No. [1] ¶ 14. Defendant, however, is a private party. "[T]o hold that private parties . . . are [s]tate actors" for § 1983 purposes, courts

> must conclude that one of the following three conditions is met: (1) the State has coerced or at least significantly encouraged the action alleged to violate the Constitution ("State compulsion test"); (2) the private parties performed a public function that was traditionally the exclusive prerogative of the State ("public function test"); or (3) "the State had so far insinuated itself into a position of interdependence with the private parties that it was a joint participant in the enterprise" ("nexus/joint action test").

Rayburn ex rel. Rayburn v. Hogue, 241 F.3d 1341, 1347 (11th Cir. 2001) (alterations omitted) (quoting NBC, Inc. v. Commc'ns Workers of Am., 860 F.2d 1022, 1026–27 (11th Cir. 1988)).

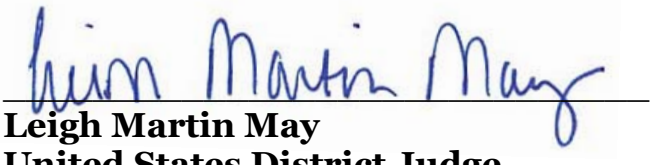
The Complaint provides little indication that any of these tests are satisfied. Defendant's only alleged link to state actors is that a police officer stood by as Defendant's subcontractor worked in the street. Dkt. No. [1] ¶ 14. Without more, the Court cannot draw a reasonable inference that Defendant's conduct qualifies as state action. Cf. Focus on the Family v. Pinellas Suncoast Transit Auth., 344 F.3d 1263, 1279 (11th Cir. 2003) (holding that the nexus/joint action

test may be satisfied when "the private actor is merely a surrogate for the state"). Without state action, Plaintiff has no cause of action under § 1983.[5]

IV. CONCLUSION

In light of the foregoing, Defendant Verizon Wireless Services, LLC's Motion to Dismiss [16] is **GRANTED**. Plaintiff's Complaint is **DISMISSED WITHOUT PREJUDICE**. The clerk is **DIRECTED** to close this case.

IT IS SO ORDERED this 19th day of January, 2021.



Leigh Martin May
United States District Judge

[5] Additionally, the Court notes that Plaintiff's § 1983 claim does not allege the violation of any rights not connected to claims already dismissed.