

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CONTEST PROMOTIONS, LLC,

Plaintiff-Appellant,

v.

CITY AND COUNTY OF SAN
FRANCISCO,

Defendant-Appellee.

No. 17-15213

D.C. No. 3:16-cv-06539-SI

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Susan Illston, Senior District Judge, Presiding

Submitted July 12, 2017 **
San Francisco, California

Before: GRABER and FRIEDLAND, Circuit Judges, and MARSHALL,***
District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes that this case is suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

*** The Honorable Consuelo B. Marshall, Senior United States District Judge for the Central District of California, sitting by designation.

Pursuant to 28 U.S.C. § 1292(a)(1), which permits appellate review of interlocutory orders denying injunctions, Plaintiff Contest Promotions, LLC, appeals the denial of its motion for a preliminary injunction. In its initial complaint, Plaintiff argued that Article 6 of the San Francisco Planning Code violates the First Amendment and that the accrual of penalties while Plaintiff mounted its First Amendment challenge violates Ex Parte Young, 209 U.S. 123 (1908). The district court denied Plaintiff's motion for a preliminary injunction, and Plaintiff timely appealed.

After filing this appeal, Plaintiff filed a first amended complaint alleging the same theories. Defendant City and County of San Francisco moved to dismiss for failure to state a claim, and the district court granted Defendant's motion. In an opinion filed this date, we affirm that dismissal. Accordingly, we dismiss this interlocutory appeal as moot. See Bhd. of Maint. of Way Emps. Div./IBT v. BNSF Ry., 834 F.3d 1071, 1076 (9th Cir. 2016) (noting that "subsequent entry of the final judgment in the case mooted the question of the procedural propriety of the preliminary injunction"); Sec. & Exch. Comm'n v. Mount Vernon Mem'l Park, 664 F.2d 1358, 1361–62 (9th Cir. 1982) (dismissing appeal from denial of preliminary injunction where the district court subsequently dismissed the relevant count of the complaint for failure to state a claim and appeal of that dismissal was

before the court); see also Envtl. Prot. Info. Ctr., Inc. v. Pac. Lumber Co., 257 F.3d 1071, 1075 (9th Cir. 2001) ("[I]nterlocutory orders entered prior to the judgment merge into the judgment.").

APPEAL DISMISSED.