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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

BENJAMIN MANN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 14-2200
	)	
CITY OF CHAMPAIGN, ILLINOIS, et al.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS COUNTS I AND II IN PART AND COUNTS III, IV, V, VI AND VII IN TOTAL

NOW COME Defendants, CITY OF CHAMPAIGN, ILLINOIS (hereinafter "City"), and Champaign Police Officers CHRISTOPHER C. AIKMAN, DAVID BUTLER, NATHANIEL M. EPLING, KRISTINA HAUGEN, MARSHALL HENRY, MATT R. RUSH and CULLY T. SCHWESKA (collectively hereinafter "Individual Defendants"), by David E. Krchak of Thomas, Mamer & Haughey, LLP, and submit this Memorandum of Law in Support of their Motion to Dismiss certain counts and certain aspects of other counts of Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

I. INTRODUCTION

Plaintiff has filed a complaint in nine counts against the City and Individual Defendants alleging a variety of torts in conjunction with Plaintiff's arrest on March 16, 2014, in Champaign, Illinois. Some of the counts specifically allege claims against Individual Defendants in both their individual and official capacities, other counts fail to make that distinction. Individual Defendants have responded to Counts I and II in their individual capacities by way of Answers. All counts against the Individual Defendants in their official capacities are

appropriately viewed as allegations against the City and, hence, must contain allegations of a pattern or practice in order to state a cause of action upon which relief can be granted. Since there are no facts pled establishing any pattern or practice by the City, the Individual Defendants pray that allegations against them in their official capacities wherever they may be interpreted to exist in this Complaint be dismissed with prejudice and for costs.

To the extent Counts III alleges claims against Individual Defendants in their official capacities, the same deficiency is present and Count III should be dismissed as to their official capacities. Other bases for dismissal of Count III in Individual Defendants' individual capacities are argued below.

Count IV asserts claims against the City for failure to train and discipline. The argument below with regard to Count IV that this count fails to state a cause of action upon which relief can be granted, provides the authority for the dismissal of Counts I and II for claims against the Individual Defendants in their official capacities.

Counts V, VI and VII allege claims against the Individual Defendants under state tort law. Those counts are addressed specifically below.

Counts VIII and IX are allegations against the City also under state law. Those counts are not subject to this motion and have been addressed by an Answer from the City.

COUNTS I AND II

A suit against an Individual Defendant in his or her official capacity is against the local government itself. Brandon v. Holt, 469 U.S. 464 (1985). Nothing in either Count I or Count II makes any allegations against the City regarding a pattern or practice. This failure to state a claim is more fully addressed in the City's response to Count IV below.

WHEREFORE, the Individual Defendants pray that Counts I and II against each of them in the official capacities be dismissed with prejudice and for costs.

COUNT III

In paragraph 54 of the Complaint, Plaintiff asserts, "Police Officers have an obligation to protect citizens from constitutional violations by other fellow officers. Therefore, an officer who witnesses other officers violating an individual's constitutional right is liable to the victim for failing to intervene." This is a mischaracterization of the law. In order to state a cause of action for failure to intervene, Plaintiff must plead, and ultimately prove, the each individual officer had a "realistic opportunity to intervene to prevent the harm from occurring." Yang v. Hardin, 37 F.3d 282 (7th Cir. 1994). Thus, a failure to intervene claim must allege facts for each individual officer that he or she had such a reasonable opportunity to intervene at a particular time to avoid the damages alleged in this case. That is, an individual officer had the opportunity to intervene such that alleged damages would have been avoided.

As an example, the Facts Common to All Counts alleged in the Complaint show that Officer Haugen arrived after the arrest was successfully completed. Her realistic opportunity to intervene was absolutely not shown by the facts alleged in this Complaint.

WHEREFORE, the Individual Defendants pray that Count III be dismissed as to both their individual and official capacities.

COUNT IV

The allegations contained under Count IV can be analyzed in the light of failure to train cases. Here there are no facts alleged regarding failure to train other than the conclusion that because it is alleged that this Plaintiff suffered damages caused by excessive use of force by

these officers, inadequate training existed and was the cause of harm to this Plaintiff. This is not adequate to state a cause of action.

In City of Canton v. Harris, 49 U.S. 378 (1989), the Supreme Court held that, "The inadequacy of police training my serve as a basis for §1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. Before liability can attach under a failure to train theory, it must be established that the municipality was on notice of a pattern of constitutional violations resulting from inadequate training of employees."

"The fact that a particular officer may not have been well-trained, will not alone suffice to fasten liability upon the City." Hirsch v. Burke, 40 F.3d 900 (7th Cir. 1994). In the absence of further allegations, it is insufficient to allege that the City of Champaign was deliberately indifferent to constitutional violations. It does not follow that if officers have acted improperly, they must have been inadequately trained. Allegations of a singular incident of unconstitutional conduct cannot form a sufficient basis for establishing a policy of unconstitutional actions.

The Defendants acknowledge that United States Supreme Court case Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993), established that there was no heightened pleading standard in failure to train cases. However, that analysis is under scrutiny since Ashcroft v. Iqbal, 566 U.S. 662 (2009), especially in light of the fact that the allegations with regard to training are entirely conclusory.

WHEREFORE, the City prays that this Court rule that the conclusory allegations without any facts alleged in Count IV, and as they might apply to Counts I and II, result in dismissal of these counts.

COUNT V

"Malicious prosecution is a cause not favored in the law." Ghosh v. Roy, 208 Ill.App.3d 30 (5th Dist. 1991).

Plaintiff has failed to allege that Individual Defendants instituted or continued proceedings maliciously. Under Illinois common law, there are five elements to a claim of malicious prosecution: (1) the commencement or continuance of a civil or criminal judicial proceeding by the Defendant; (2) the termination of the proceeding in the Plaintiff's favor; (3) the absence of probable cause for the proceeding, (4) the presence of malice, and (5) damages to the Plaintiff. Rodgers v. People's Gas, Light & Coke, 733 N.E.2d 835, 840 (Ill.App. 2000); Sneed v. Rybicki, 146 F.3d 478, 480-81 (7th Cir. 1998). *(update these cases)*

To survive a motion to dismiss, a Plaintiff bringing suit against arresting officers must allege that the officers committed some improper act after they arrested him without probable cause. Snodderly v. R.U.F.F. Drug Enforcement Task Force, 239 F.3d 892, 901 (7th Cir. 2001). Plaintiff here does not plead any facts that plausibly indicate that the officers engaged in malicious prosecution. The Plaintiff would need to allege malice by alleging that the officers pressured or influenced the prosecutors to indict, made knowing misstatements to the prosecutor, testified untruthfully, or covered up exculpatory evidence. While there are allegations here that there was a conspiracy afoot, there are no specific facts to support the conclusory statements.

The issues regarding conspiracy are addressed in this memorandum under Count VII.

WHEREFORE, the Individual Defendants pray that Count V be dismissed as to both their individual and official capacities.

COUNT VI

The elements of Intentional Infliction of Emotional Distress under Illinois common law are: (1) Defendants' conduct was extreme and outrageous; (2) the Defendant either intended to inflict severe emotional distress or knew that there was a high probability that its conduct would do so; and (3) the Defendants' conduct actually caused severe emotional distress.

However, it is not enough that a Defendant acted with an intent to inflict emotional distress or even that his conduct has been characterized by malice or a degree of aggravation. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency. Restatement (Second) of Torts §46, comment D (1965) as quoted in Public Finance Corp. v. Davis, 66 Ill.2d 85, 360 N.E.2d 765 (1976). Thus, the conduct must go beyond all bounds of decency and be considered intolerable in a civilized community. Campbell v. A.C. Equipment Services Corporation, Inc., 242 Ill.App.3d 707 (4th Dist. 1993); Bracket v. Galesburg Clinic Ass'n., 293 Ill.App.3d 867 (3rd Dist. 1997). The most obvious shortcoming in establishing intentional infliction of emotional distress in this complaint, however, is the absolute failure to establish the severe emotional distress required under both elements (2) and (3). In Welsch v. Commonwealth Edison Company, 306 Ill.App.3d 148 (1st Dist. 1999), the court upheld the trial court's decision dismissing the complaint for Intentional Infliction of Emotional Distress. In Welsch, employees at a nuclear power station sued the employer where they received demotions and transfers following complaints of safety concerns to management and to the Nuclear Regulatory Commission. The Plaintiff's complaint was dismissed in part because there were no factual allegations establishing severe emotional distress. McCaskil v. Bar, 92 Ill.App.3d 157 (1st Dist. 1980), "To state an action for intentional infliction of emotional distress, the complaint must be

specific, and detailed beyond what is normally considered permissible in pleading a tort action. A Plaintiff must allege some facts which if true, would support the conclusion that the emotional distress actually suffered was a proximate result of Defendant's conduct was severe. Merely characterizing emotional distress as severe is not sufficient." In Welsch, the complaint contained no factual allegations from which the level of severity of emotional distress could be inferred. The Plaintiffs did not allege that they were hospitalized or were required to seek medical care nor did they allege that any of them was inflicted with a physical or mental condition rendering him or her particularly vulnerable to emotional distress. Kolegas v. Heftel Broadcasting Corp., 154 Ill.2d 1 (1992).

WHEREFORE, Defendants pray that Count VI be dismissed as to each of them with prejudice and for costs.

COUNT VII

In order to properly plead a claim of civil conspiracy under Illinois law, a party must allege the existence of an agreement and a tortious act committed in furtherance of that agreement. Lozman v. Putnam, 379 Ill.App.3d 807 (1st Dist. 2008), citing McClure v. Owens Corning Fiberglass Corp., 188 Ill.2d 102 (1999). Conclusory allegations that several defendants agreed to pursue some improper or illicit goal is not sufficient to state a claim. Reuter v. Mastercard, International, Inc., 397 Ill.App.3d 915 (5th Dist. 2010). Simply characterizing a combination of acts as a conspiracy is insufficient to withstand a motion to dismiss. Buckner v. Atlantic Plant Maintenance, Inc., 182 Ill.2d (1998).

To sustain a civil conspiracy claim, the Plaintiff must allege that Defendants "directed themselves toward an unconstitutional action by virtue of a mutual understanding," and support such allegations with facts suggesting a "meeting of the minds." Sherer v. Balkema, 840 F.2d

437 (7th Cir. 1988). The only "facts" alleged here were that the officers acted jointly. There is not, nor could there reasonably expected to be, an allegation that these officers somehow had a meeting of the minds prior to the actions of the Plaintiff resulting in his arrest. "Mere conclusory allegations of conspiracy cannot, absent reference to material facts, state a substantial claim." McAfee v. Fifth Circuit Judges, 884 F.2d 221 (5th Cir. 1989).

WHEREFORE, Individual Defendants, in their individual capacities and the City to the extent that Count VII attempts to state a cause of action against it or officers in their official capacities, pray that Count VII be dismissed.

Respectfully submitted,

CITY OF CHAMPAIGN, ILLINOIS and Police Officers, CHRISTOPHER C. AIKMAN, DAVID BUTLER, NATHANIEL M. EPLING, KRISTINA HAUGEN, MARSHALL HENRY, MATT R. RUSH and CULLY T. SCHWESKA

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to Shneur Nathan.

s/ David E. Krchak

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