UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NICHOLE MARIE McDANIEL, and
LESSIE LEE DAVIES,
both individually and on behalf of a class of others
similarly situated,

Plaintiffs,

-against-

CA No. 04-CV-0757

COUNTY OF SCHENECTADY,
HARRY BUFFARDI, both individually and in
His official capacity as Sheriff of the County of
Schenectady, GORDON POLLARD, both
Individually and as Undersheriff of the
County of Schenectady, and ROBERT
ELWELL, both individually and as Major
In the Schenectady County Sheriff's Department,

Defendants.

MEMORANDUM OF LAW

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Preliminary Statement

1. Defendants Harry Buffardi and Robert Elwell move for partial summary judgment to dismiss all claims in the plaintiffs' Complaint alleging individual and personal liability against these defendants, as opposed to the claims contained in the Complaint alleging wrongdoing in their professional capacities, upon the grounds that defendants Harry Buffardi and Robert Elwell were never personally served with the Summons and Complaint and therefore jurisdiction has not been obtained over them in their individual capacities.

2. Because the Complaint makes no allegations of wrongdoing on the part of these defendants in their individual capacities and there is no evidence that these individual defendants played any role in the activities which give rise to the plaintiff's Complaint; the defendants are entitled to dismissal of the Complaint against them in their individual capacities.

Statement of facts.

The Court is respectfully referred to the Affidavits of William J. Greagan, Esq., Harry Buffardi, Gordon Pollard, and Robert Elwell, and the Statement of Material Facts.

Argument

I. Standard for summary judgment.

Summary judgment is appropriate where "there is no genuine issue as to any material facts ... the moving party is entitled to a judgment as a matter of law" (Fed.R.Civ.P. 56(c)). The moving party bears the initial responsibility of informing the Court of the basis for its motion, and identifying those portions of the "pleadings, depositions, answers to interrogatories, and admissions on file together with any affidavits, if any, which it believes demonstrates the absence of a genuine issue of material fact" Celotex Corp. v. Catrett, 477 U.S. 317, 323 106 S. Ct. 2548 (1986). "If the moving party meets the initial burden of showing the absence of the material and triable issue of facts, the burden then moves to the opposing party, who must present significant probative evidence to support its claim or defense". Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2nd 1551, 1558 (9th Cir. 1991), quoting Richards v. Nielsen Freight Lines, 810 F.2nd 898, 902 (9th Cir. 1987).

The non-moving party must go beyond the pleadings and designate facts showing an issue of material fact for trial. Celotex Corp., supra, 477 U.S. at 322-323. Whether a fact is material is governed by the substantive law governing a claim. Burt Rigid Box v. Travelers Prop. Cas. Corp., 302 F.3d 83,90 (2nd Cir. 2002). The "mere

existence of a scintilla is evidence" in support of the non-moving party's claim is insufficient to defeat summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505 (1986). The party opposing a motion for summary judgment cannot stand on mere allegations in its pleadings, or simply assert that it will be able to discredit the moving party's evidence at trial. Fed.R.Civ.P. 56(e); see also T.W. Elec. Serv. Inc. v. Pacific Elec. Contractor's Ass'n, 809 F.2nd 626, 630 (9th Cir. 1987).

The party opposing the motion must do more than show that there is some metaphysical doubt as to the evidence. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348 (1986). Thus, to avoid summary judgment, the non-moving party must come forward with specific facts and significant probative evidence demonstrating the existence of a genuine issue of facts for trial. Celotex Corp., supra, 477 U.S. at 327.

II. Plaintiffs failed to personally serve Defendants Buffardi and Elwell.

The Federal Rules of Civil Procedure directs how service is to be made. The 4(c)(1) requires that:

> "A Summons shall be served together with a Complaint; the plaintiff is responsible for service of the Summons and Complaint within the time allowed under subdivision (m) and shall furnish the person affecting service with the necessary copies of the Summons and Complaint."

Rule 4(e) provides that:

> "Unless otherwise provided by Federal Law, service upon an individual from whom a waiver has not been obtained and filed, other than an instant and incompetent person, may

be affected in any judicial district of the United States:

(1) Pursuant to the law of the state in which the District Court is located or in which service is effected, for the service of the Summons upon the defendant upon an action brought in the Court of general jurisdiction of the State; or

(2) By delivering a copy of the Summons and Complaint to the person individually or by leaving copies thereof at the individual's dwelling, house or usual place of abode with some person of suitable age or discretion then residing therein or by delivering a copy of the Summons and Complaint to an agent authorized by appointment or by law to receive service of process".

Rule 4(m) provides that:

"If service of the Summons and Complaint is not made upon the defendant within 120 days of filing of the Complaint, the Court can on motion or on its own initiative after notice to the plaintiffs, shall dismiss the action without prejudice as to the defendant or direct that service be effected within a specific period time; provided that the plaintiff shows good cause for the failure, the Court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

New York Civil Practice Law and Rules Section 308 prescribes methods by which person service may be made upon a natural person:

"1. By delivering the Summons within the State of the person to be served; or

2. By delivering the Summons within the State to a person of suitable age and discretion at the actual place of business, dwelling or usual place of abode of the person to be served and by either mailing the Summons to the person to be served at his or her last known residence or by mailing the Summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "Personal and Confidential" and not indicating on the outside thereof by return address or otherwise that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within 20 days of each other; proof of service shall be filed with the clerk of the Court designated in the Summons within 20 days from either such delivery or mailing, whichever is effected later; service shall be complete 10 days after such filing; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service, except in matrimonial actions for service hereunder may be made in accordance with the provisions of subdivision (a) of Section Two Hundred Thirty Two of the Domestic Relations Law; or

3. By delivering the Summons within the State to an agent for service of the person to be served as designated under Rule 318, except in matrimonial actions where service hereunder may be made pursuant to an Order made in accordance with the provision of subdivision (a) of Section Two Hundred Thirty Two of the Domestic Relations Law;

4. If service under paragraphs one and two cannot be made with due diligence by affixing the Summons to the door of either the actual place of business, dwelling place or usual place of abode within the State of the person to be served and by either mailing the summons to such person at his or her last known address or by mailing the Summons by

first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "Personal and Confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such affixing and mailing to be effected within 20 days of each other; proof of such service shall be filed with the Clerk of the Court designated in the Summons within 20 days of either such affixing or mailing, whichever is effected later; service shall be complete 10 days after such filing except in matrimonial actions for service thereunder may be made pursuant to an Order in accordance with the provisions of subdivision (a) of Section Two Hundred Thirty Two of Domestic Relations Law;

5. In such manner as the Court, upon motion without notice, directs, that service is impracticable under paragraphs one, two and four of this section.

6. For purposes of this Section, "actual place of business shall include any location that the defendant, through regular solicitation or advertisement, has held out as its place of business"."

Review of the Affidavits of Harry Buffardi and Robert Elwell and the Docket in this action show that there is no evidence that the plaintiffs personally served Harry Buffardi or Robert Elwell in accordance with either Rule 4 of the Federal Rules of Civil Procedure or Section 308 of the New York Civil Practice Law and Rules.

According to the Docket, the plaintiff commenced this action by the filing of a Summons and Complaint on July 19, 2004. Pursuant to Rule 4(m), the time in which to effect service under the Federal Rules expired on November 16, 2004. Also, as set forth in the Affidavits of Robert Elwell and Harry Buffardi, no service has been made upon

them by substituted service in accord with CPLR §308. The time in which to do so has expired. On this basis alone, defendants Harry Buffardi and Robert Elwell are entitled to a dismissal of all claims held against them in this action in their *individual* capacities.

Review of the Complaint demonstrates that it is devoid of any factual basis for the imposition of liability against defendants Harry Buffardi, Gordon Pollard and Robert Elwell in their individual capacities. There is no factual allegation of any act on the parts of defendants Harry Buffardi, Gordon Pollard or Robert Elwell in their individual capacities against the plaintiffs, contained in the Complaint.

III. Defendants Buffardi, Pollard and Elwell are not liable in their individual capacities.

The plaintiffs' Complaint broadly alleges that the individual plaintiffs were illegally strip searched in the course of the booking process at the Schenectady County Jail. On December 7, 2004 defendants served Notices to Admit pursuant to Rule 36 of the Federal Rules of Civil Procedure. Rule 36(a) provides in relevant part that:

> "Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the Court may allow, or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the parties attorney. Neither party has objected to the admissions sought herein. The time to do so has passed."

Review of the admissions of Lessie Davies, the Affidavits of Harry Buffardi, Gordon Pollard and Robert Elwell and a review of the Complaint, shows that none of these individual defendants had anything to do with booking or alleged searches involving plaintiffs Nichole Marie McDaniel or Lessie Lee Davies.

Since there is no genuine issue of material fact relating to liability on the part of Harry Buffardi, Gordon Pollard, or Robert Elwell in their individual capacities, and because Defendant Harry Buffardi and Robert Elwell were never personally served with the Summons and Complaint in this action, these defendants are entitled to a dismissal of the Complaint against them in their individual, as opposed to their official capacities.

IV. Plaintiffs claims against Buffardi, Pollard and Elwell in their official capacity must be dismissed because the plaintiffs have alleged a *Monell* type claim against the County.

Because the claims here against the individual defendants in their official capacities are functionally equivalent to the plaintiffs' claims against the County, the claims asserted against Mssrs. Buffardi, Pollard, and Elwell in their official capacities should be dismissed. Citing the Supreme Court in Kentucky v. Graham, 473 U.S. 159 (1985), the Northern District has stated:

> A claim against a municipal officer acting in his official capacity is, in reality, a claim against the municipal entity itself. Thus, plaintiff's claims against the various police officers in their official capacities are to be treated as a suit against the [municipality]. In that regard, plaintiff's claims against the defendants in their official capacities are dismissed.

Pritzker v. City of Hudson, 26 F.Supp.2d 433 (NDNY 1998) (internal citation omitted). Based upon the distinction between official and personal capacity claims, "district courts have dismissed official-capacity claims against individuals as redundant or unnecessary where *Monell* claims were also asserted against the entity." Snall v. The City of New York, 1998 WL 960296, *4 (EDNY 1998). See also Fox v. City of New York, 2004 WL 856299, *13 (SDNY 2004) (citing Kentucky v. Graham, supra); Corona v. Lunn, 2002

WL 550963, *5 (SDNY 2002) ("[S]ince claims against state officers acting in their official capacities 'generally represent only another way of pleading an action against an entity of which an officer is an agent, summary judgment also will be granted in favor of Lunn on the official capacity claims asserted against her." [internal citations omitted]); Azzam v. The Travelers Insurance Company, 2000 WL 151906, *2 (NDNY 2000) ("Plaintiff's official-capacity claims against Hopkins and Foody effectively name City as the real party in interest. Consequently, an official-capacity suit is, in all respects other than name, to be treated as suit against the entity." [internal citation and quotation omitted]); Wallikas v. Harder, 67 F.Supp.2d 82, 83 (NDNY 1999) ("In general, claims against municipal officials in their official capacities are really claims against the municipality and, thus, are redundant when the municipality is also named as a defendant."); Riley v. Town of Bethlehem, 44 F.Supp.2d 451, 466-467 (NDNY 1999) ("It is apodictic that claims against an individual in his official capacity are to be treated as claims against the municipality."); LaCorte v. Hudacs, et al., 1996 WL 590735, *4-5 (NDNY 1996) ("A suit against a municipal officer in her official capacity is functionally equivalent to a suit against the entity of which the officer is an agent. . . . Consequently, it would be redundant to allow this suit to proceed against Rensselaer County *and* the individuals in their official capacities.").

Here, plaintiffs' attorneys left little doubt regarding the nature of plaintiffs' claims. At a telephone conference held November 30, 2004 before Magistrate Judge Randolph F. Treece, plaintiffs' attorney, Elmer R. Keach, III represented on the record that this claim is not against individuals in any capacity, with the possible

exception of the corrections officer that strip searched the plaintiffs in the event class certification is denied, but against the municipality:

> That's not how this case is pled, it's not how it's going to be pled, and, you know, I can affirmatively make that representation to the Court, that we're not gonna go out and make individual corrections officers defendants in this case. It's a class action against the County for a practice; it's an overarching Monell claim.

Transcript 11/30/04 at 11.

Magistrate Treece restated the plaintiffs' assertions without objection from plaintiffs' attorneys: "Mr. Greagan, you've heard from Mr. Keach that this is a Monell claim, it is against the County, it's not against any individual, and he's making this affirmative representation that he intends not to hold any individual responsible." Transcript 11/30/04 at 12. Later in the conference, Mr. Keach and Magistrate Treece engaged in the following exchange:

> Mr. Keach: I will state on the record with regards to any individual corrections officers that are contacted in an ex parte sense, we will not do so. We will not sue those corrections officers.
>
> We have no interest to sue individual corrections officers. The only interest that my colleagues and I have is to stop the practice – which still continues, by the way – and hold Schenectady County, Schenectady County as compared to individuals, financially responsible for what – for violating the rights of thousands of individuals. That's the goal of this litigation, that's the goal that's communicated in the complaint, and we have no interest to sue individual corrections officers here.

* * *

> The Court: So, Mr. Keach, if I understand this, we go forward to determine class certification. Let's presume that you do not get it. Then you will proceed to prosecute this on behalf of the named plaintiffs and that there is a possibility with regards to those two of maybe including other parties. But if you get your class certification, this is a Monell claim going right after the County?
>
> Mr. Keach: That sums up the plaintiffs' position perfectly, your Honor.

Transcript 11/30/04 at 19 – 20.

Because the plaintiffs have affirmatively represented on the record and to the Court that their claims, insofar as asserted against individuals are, in effect, claims against the County, and because of case law establishing the redundancy of such claims, the claims against Mssrs. Buffardi, Pollard, and Elwell in their official capacities should be dismissed. Because the plaintiffs have affirmatively represented to the Court they have no intention of pursing claims against Mssrs Buffardi, Pollard, and Elwell personally, claims against these individuals in their personal capacity should also be dismissed.

Conclusion.

Since Harry Buffardi and Robert Elwell were never personally served in this action, the Court has no jurisdiction over these defendants in their individual capacities. With respect to the defendants Buffardi, Pollard and Elwell, the plaintiffs' admissions and the defendants' Affidavits show that there is no basis for the imposition of liability on the part of these defendants in their individual capacities or official

capacities and, therefore, the Complaint against them should be dismissed on the merits and with prejudice.

DATED: Albany, New York
January 31, 2005

Respectfully submitted,

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