Doe v. City of Chicago

United States District Court for the Northern District of Illinois, Eastern Division
October 2, 1995, Decided ; October 4, 1995, DOCKETED
No. 95 C 2117

Reporter: 1995 U.S. Dist. LEXIS 14517
JANE DOE, Plaintiff, vs. CITY OF CHICAGO, DETECTIVE JAMES CONTINO, Officer/Detention Aide HUNT-HARDIN, Officer/Detention Aide McCARY, and DONALD V. NORTON, Investigator, Office of the U.S. Attorney, Defendants.

Counsel: [*1] For JANE DOE, plaintiff: Janis M. Susler, G. Flint Taylor, Jr., People's Law Offices, Chicago, IL.

For CITY OF CHICAGO, defendant: Irene Schild Caminer, Sharon Baldwin, Margaret Ann Carey, Patricia Jo Kendall, City of Chicago, Law Department, Chicago, IL. Susan S. Sher, Corporation Counsel, City of Chicago, Chicago, IL. For JAMES CONTINO, Det. Star No. 20733, HARDIN-HUNT, Officer/Detention Aide, MCCARY, Officer/Detention Aide, defendants: James Patrick McCarthy, Dawn Eileen Bode, City of Chicago, Law Department, Corporation Counsel, Chicago, IL. Robert W. Barber, City of Chicago Law Department, Chicago, IL.

Judges: EDWARD A. BOBRICK, United States Magistrate Judge. HONORABLE ELAINE E. BUCKLO, JUDGE, UNITED STATES DISTRICT COURT

Opinion by: EDWARD A. BOBRICK

Opinion

HONORABLE ELAINE E. BUCKLO, JUDGE

UNITED STATES DISTRICT COURT

HONORABLE JUDGE:

REPORT AND RECOMMENDATION of Magistrate Judge Edward A. Bobrick

Before the court is the motion of defendants James Contino, Denise Hunt, Lynette Hardin, and Katrina McCarty [1] to dismiss Counts I, III, IV, V, and VI of the complaint of plaintiff Jane Doe pursuant to *Fed.R.Civ.P. 12(b)(6)*.

[*2] **I. BACKGROUND**

Plaintiff, a 41-year old woman, brings this complaint under *42 U.S.C. § 1983* and the common law of the state of Illinois. She alleges defendants subjected her to certain violations of her Constitutional rights and state law violations stemming from incidents that occurred on October 20, 1994. The Counts pertinent to the instant motion are:

> Count I: against defendant Contino for violation of the *Fourth* and Fourteenth Amendments' guarantees against unlawful search and seizure;
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> Count III: against defendants Hunt-Hardin for violation of plaintiff's rights to privacy, equal protection, and freedom from unlawful searches and seizures under the *Fourth*, *Fifth*, Ninth, and Fourteenth Amendments;
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> Count IV: against defendants Contino and Norton for conspiring to violate plaintiff's right to freedom from unlawful searches and seizures under the *Fourth* and Fourteenth Amendments and *42 U.S.C. § 1983*;
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> Count V: against all defendants for infliction of severe emotional distress; and
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> Count VI: against defendants Contino and Norton for assault.Defendants Contino, Hunt, Hardin, and McCarty now move to dismiss these portions of plaintiff's [*3] complaint, under various theories, for failure to state causes of action under *Rule 12(b)(6)*. We turn to consider the allegations of plaintiff's complaint.

A. Plaintiff's Allegations

Review of plaintiff's complaint reveals the following allegations. On the afternoon of October 20, 1994, plaintiff was at home with her two-year-old son, when she heard her door buzzer. Looking out her window, she saw a man she did not recognize--later identified as defendant

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[1] Defendants Hunt, Hardin, and McCarty are improperly identified as Hunt-Hardin and McCary throughout plaintiff's complaint. They ask that plaintiff file an amended complaint properly identifying each of them. We hereby recommend that plaintiff be so ordered.

Norton--who stated he was from the U.S. Attorney's office. Nevertheless, because he was not known to plaintiff, she did not let him in her home. Thereafter, plaintiff heard male voices outside her home stating they were police offices, and defendants Norton and Contino broke down her door.

Defendants Contino and Norton proceeded into plaintiff's home, kicking in the bathroom door, looking through rooms and closets, and insulting and laughing at plaintiff. They claimed to have a warrant for plaintiff's arrest, but would neither show it to her or tell her what her offense had been. Additional police officers arrived, and plaintiff was handcuffed, taken into custody, and transported to the police station at Belmont and Western. [*4] At the stationhouse, defendant Norton served plaintiff with a summons concerning her default on a student loan in the amount of $ 667.52.

From the Belmont and Western station, plaintiff was taken to police headquarters at 11th and State, where two male officers escorted her to female lockup. There, prior to entering the lockup and in view of the male officers and others, two female officers plaintiff can identify only as defendants Hunt-Hardin and McCary [2] forced plaintiff to expose and shake her breasts. Next, one of the two female officers took plaintiff to a small room and subjected her to an intrusive strip search, that encompassed removal of plaintiff's tampon and sanitary napkin. These searches produced no contraband. Plaintiff's sister bonded her out, and only later could plaintiff discover the nature of the warrant. It had issued in Hinsdale, Illinois, for plaintiff's failure to pay a fine for speeding and driving on a suspended license.

[*5] **B. Defendants' Arguments**

The defendants lodge several arguments to support their motion to dismiss. First, defendant Contino argues that he had probable cause to enter and arrest plaintiff, and to search her home, stemming from a valid warrant; thus, he did not violate her Constitutional rights and those claims must be dismissed. Second, he argues that plaintiff's assault claim must be dismissed because he was acting with lawful authority. Third, he contends that plaintiff's conspiracy claim fails to include the proper elements and must be dismissed. Fourth, he submits that, based on his lawful execution of a warrant, he is entitled to qualified immunity against plaintiff's claims.

Defendants Hunt, Hardin, and McCarty contend that there is no cause of action for a violation of plaintiff's right to privacy under the Ninth Amendment, and that claim must be dismissed. Further, defendants Hunt, Hardin, and McCarty contend that plaintiff's *Fifth Amendment* claim is defective in that it fails to allege that they were acting under the color of state law. The defendants also submit that all of plaintiff's claims are improperly brought under the Fourteenth Amendment. [3] Finally, [*6] the defendants argue that plaintiff has failed to adequately allege a claim for infliction of severe emotional distress. We address each of these arguments in the context of plaintiff's complaint.

II. ANALYSIS

A. Motion to Dismiss

In considering a motion to dismiss, we accept as true all well-pleaded factual allegations and draw all possible inferences in favor of the plaintiff. *Thompson v. Boggs,* 33 F.3d 847, 852 (7th Cir. 1994). A complaint will not be dismissed unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of her claim which would entitle her to relief. *Id.* With these factors in mind, we assess plaintiff's complaint in this case.

B. Defendant Contino

[*7] Plaintiff alleges that defendant Contino violated her right to be free from unreasonable searches and seizures under the *Fourth* and Fourteenth Amendments, that defendants Contino and Norton conspired to violate her rights, and that defendant Contino assaulted her. As noted above, defendant Contino argues that he did not violate plaintiff's Constitutional rights because he was acting pursuant to a valid warrant. He also contends that the plaintiff has failed to adequately allege a conspiracy claim. Finally, he submits that because he was acting with lawful authority, plaintiff cannot make out a claim for assault against him, and that he is entitled to qualified immunity against all of plaintiff's claims.

1. Search and Seizure Claims

According to plaintiff's complaint, defendant Contino, along with defendant Norton, announced he was a police officer and kicked in plaintiff's door without allowing her a chance to respond. Although he had an arrest warrant--for a traffic offense--he refused to show it to plaintiff. While verbally abusing the plaintiff, who was home with her two-year-old son, defendant Contino searched plaintiff's entire apartment, kicking down a bathroom [*8] door in the process. Finally, along with

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[2] These individuals have since been identified as officers Denise Hunt, Lynette Hardin, and Katrina McCarty.

[3] The *Fourth Amendment*, under which plaintiff brings much of her complaint, is applicable to the states only through the Fourteenth Amendment. *Wolf v. Colorado,* 338 U.S. 25, 27-28, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949). Accordingly, dismissal would be inappropriate.

some later-arriving police officers, defendant Contino handcuffed plaintiff and took her into custody. Defendant Contino argues that he acted reasonably because he had a valid arrest warrant and was justified in conducting a "protective sweep" of plaintiff's apartment.

Excessive force claims resulting from any seizure are analyzed under the *Fourth Amendment's* objective reasonableness standard. *Graham v. Connor,* 490 U.S. 386, 395, 109 S. Ct. 1865, 1871, 104 L. Ed. 2d 443 (1989); *Jaffee v. Redmond,* 51 F.3d 1346, 1353 (7th Cir. 1995). The issue is whether the police officer's actions were objectively reasonable in light of the facts and circumstances confronting the officer at the time. *Graham,* 490 U.S. at 397, 109 S. Ct. at 1872; *Jones by Jones v. Webb,* 45 F.3d 178, 183 (7th Cir. 1995). Relevant factors include the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officers or others, and whether the suspect was actively resisting arrest or attempting to flee. *Graham v. Connor,* 490 U.S. at 396, 109 S. Ct. at 1872; *Jaffee,* 51 F.3d at 1346. The court must also allow for the [*9] fact that police officers are often forced to make split-second judgments regarding the amount of force they need to use, in situations that are tense, uncertain, and rapidly evolving. *Graham,* 490 U.S. at 396-97, 109 S. Ct. at 1872. At this early point in these proceedings, these factors weigh against dismissal of plaintiff's claims.

First, there is no dispute that the offense from which the warrant stemmed was nothing more than a minor traffic offense--not a serious crime at all. According to the complaint, plaintiff posed no threat to defendant Contino and made no attempt to flee or resist arrest. Indeed, it would appear--again, from plaintiff's allegations--that she was not even given an opportunity to refuse defendant Contino entry into her home. While police are often confronted with tense, rapidly evolving situations, this was not one of them. It may well have been that defendant Contino could have diffused whatever threat he perceived from plaintiff by merely showing her the warrant he claimed to have and explaining his presence. [4] She was, after all, a 41-year-old woman home alone with her two-year-old son and may have had a more justifiable fear of two strange men attempting [*10] to enter her home than they had of her.

Furthermore, although the state of Illinois does not have a statutory "knock-and-announce" rule, *cf. U.S. v. Markling,* 7 F.3d 1309, 1318 (7th Cir. 1993) (*citing* 18 U.S.C. § 3109), Illinois courts have applied the requirement that officers knock and announce their authority and purpose prior to breaking into an individual's home. *People v. Condon,* 148 Ill. 2d 96, 101-103, 108, 592 N.E.2d 951, 954-56, 957, 170 Ill. Dec. 271 (1992). The purpose of the rule is to notify the person inside the dwelling of the presence and purpose of the police, and to give that person time to respond, avoid violence, and protect privacy as much as possible. *Id.* at 103, 592 N.E.2d at 954. Here, while defendant Contino announced he was a police officer, he gave no indication [*11] of his purpose, and immediately broke into plaintiff's home, giving her no chance to respond to his announcement. He never did show plaintiff the warrant he finally claimed to have once he had broken down her front door. The complaint suggests no exigent circumstance existed that would excuse defendant Contino from full compliance with the "knock-and-announce" rule. Once again: plaintiff posed no danger to defendant Contino; there was no risk of her flight; there was no evidence of her "crime" that she could have destroyed.

As for the accompanying search of plaintiff's apartment, defendant Contino is correct in asserting that he was entitled to conduct a "protective sweep" of the premises without running afoul of the *Fourth Amendment*. In *Maryland v. Buie,* 494 U.S. 325, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990), the Supreme Court explained that:

> [a] "protective sweep" is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers and others. It is narrowly confined to a visual inspection of those places in which a person may be hiding.
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> The *Fourth Amendment* would permit [a] protective sweep [*12] . . . if the searching officer possessed a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the officer in believing that the area swept harbored an individual posing a danger to the officer or others.*Buie,* 494 U.S. at 327, 110 S. Ct. at 1094. Some of the factors relevant to the determination as to the reasonableness of the officers action are: the particular configuration of the dwelling, the characteristics of those known to be present, and the general surroundings and their history in previous law enforcement efforts. *U.S. v. Burrows,* 48 F.3d

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[4] We note. however. that defendant Contino was not *required* to do so under Illinois law. *People v. Stibal,* 56 Ill. App. 3d 1048, 1051, 372 N.E.2d 931, 933, 14 Ill. Dec. 652 (1st Dist. 1978).

1011, 1016 (7th Cir. 1995). Once again, these factors weigh against dismissal of plaintiff's claims.

There is simply nothing in plaintiff's complaint to suggest that any of the above-cited factors were applicable in this case. Plaintiff was not known to be dangerous, and there is no indication that the area in which she resided historically posed a threat to law enforcement officials. In any event, these are fact-intensive inquiries, *Burrows,* 48 F.3d at 1017-18, that are generally not amenable to disposition on a motion to [*13] dismiss.

2. Qualified Immunity

Even though plaintiff has adequately stated a claim against Defendant Contino for the violation of her Constitutional rights, he argues that he is entitled to qualified immunity because he did not act unreasonably in light of established legal principals. *See Elder v. Holloway,* 510 U.S. 510, , 114 S. Ct. 1019, 1021, 127 L. Ed. 2d 344 (1994); *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). To determine whether immunity attaches, the court must consider whether a reasonable officer could have believed his conduct was constitutional in light of the clearly established law and the information he possessed at the time of his conduct. *Webb,* 45 F.3d at 183. The court must concern itself with whether the law is clear in relation to the specific facts confronting the officer. *Id.* at 184.

Essentially, under a qualified immunity analysis, the *Fourth Amendment's* protection against unreasonable searches and seizures provides no solace to those who seek to enforce that protection through a lawsuit, as opposed to suppression of evidence: the right sought to be vindicated in [*14] a lawsuit must be more specific. *Id.* at 184; *Bakalis v. Golembeski,* 35 F.3d 318, 323 (7th Cir. 1994). Indeed, our inquiry must adhere to the specific facts of the case before us. *Webb,* 45 F.3d at 184. Because defendant Contino chooses to raise the defense of qualified immunity in a motion to dismiss, the specific facts of this case are those plaintiff alleges. *McMath v. City of Gary, Ind.,* 976 F.2d 1026, 1031 (7th Cir. 1992). In this instance, then, we must question whether a reasonable officer, claiming to be in possession of a warrant for the arrest of a 41-year-old woman for failure to pay a speeding ticket would have reasonably believed he was justified in breaking down the door of the woman's home after failing to allow her a chance to respond to his announcement of his presence, proceeding to verbally abuse and insult her as he conducted an unwarranted search of her home, causing further property damage to that home, and refusing to explain his purpose or show her the warrant prior to handcuffing and taking her into custody, all under circumstances in which the woman offered no resistance, posed no danger to him or others, or attempted to flee. While these may [*15] not be the facts that will eventually be proven to have existed, we cannot find defendant Contino is entitled to immunity in this scenario.

We realize that the caselaw cited in the previous section--*Graham Buje, et al.*-- does not specifically delineate the boundaries within which police officers may reasonably operate. Their pronouncements, couched in terms of "reasonableness" and "totality of circumstances," are of the type that are ordinarily disregarded in qualified immunity analyses. *Rice v. Burks,* 999 F.2d 1172, 1174 (7th Cir. 1993). Public officials, including police, are not required to gage their conduct against such standards. *Kernats v. O'Sullivan,* 35 F.3d 1171, 1176 (7th Cir. 1994). In this case, however, based on plaintiff's allegations, there was not a single factor at work that would justify the force defendant Contino purportedly brought to bear in his arrest of plaintiff. He was not required to make any split-second decisions: the situation was not rapidly evolving. He was not required to weigh his conduct against the serious of plaintiff's crime: her *crime* was not serious at all. He was not in any danger: plaintiff offered no resistance whatsoever. [*16] Based on the facts as we presently know them--that is, solely from plaintiff's allegations, defendant Contino is not entitled to qualified immunity. Accordingly, Count I against defendant Contino must stand.

3. Conspiracy

Under Count IV, plaintiff alleges that defendants Contino and Norton conspired to violate her Constitutional rights in violation of *42 U.S.C. § 1983*. The elements of such a claim are (1) an express or implied agreement between defendants to deprive plaintiff of her constitutional rights, and (2) deprivation of those rights through overt acts in furtherance of the agreement. *Scherer v. Balkema,* 840 F.2d 437, 440 (7th Cir. 1988). Defendant Contino argues that plaintiff has failed to adequately allege the requisite clement of an agreement between he and defendant Norton. Review of the complaint shows plaintiff alleges that the defendant reached an agreement and acted together. She also alleges facts that demonstrate that they participated in the conduct at issue in concert. Such allegations allow for an inference that they reached an agreement. *Vitaich v. City of Chicago,* 1995 U.S. Dist. LEXIS 11804, 94 c 692 (N.D.Ill. Aug. 8, 1995) *(citing Pryor* [*17] *v. Cajda,* 662 F. Supp. 1114, 1116 (N.D.Ill. 1987). Count IV of plaintiff's complaint is sufficient to withstands defendant Contino's motion to dismiss.

4. Infliction of Emotional Distress

Under Count V, plaintiff alleges that all of the defendants engaged in conduct intended to cause her emotional distress. Only defendant Contino moves to dismiss this

count, arguing that plaintiff has failed to adequately state such a claim. [5] The elements of the tort are: (1) the conduct is extreme and outrageous; (2) the actor intended or knew there was a high probability that the conduct would cause severe emotional distress; and (3) the conduct causes severe emotional distress. *McGrath v. Fahey,* 126 Ill. 2d 78, 533 N.E.2d 806, 809, 127 Ill. Dec. 724 (1988). Here, we find that plaintiff has failed to adequately allege the third element of the tort, that defendant Contino's conduct caused severe emotional distress. She alleges that she suffered "psychological injury, mental distress, and humiliation" and "severe emotional distress." (Complaint, PP 20, 34). Such allegations have been found inadequate under circumstances similar to those at bar. *Valliere v. Kaplan,* 694 F. Supp. [*18] 517 (N.D.Ill. 1988). Accordingly, Count IV must be dismissed as against defendant Contino.

5. Assault

Plaintiff brings a claim for assault against defendant Contino in Count VI of her complaint. Defendant Contino argues that this count must be dismissed because: (1) he was acting with lawful authority or, in the alternative, (2) he is immune from such a claim under Illinois law. With regard to defendant Contino's first argument, it is true that under Illinois law, a "person commits an assault when, *without lawful authority,* he engages in conduct which places another in reasonable apprehension of receiving a battery." 720 ILCS 5/12-1. As already discussed, however, plaintiff's allegations leave open the question of whether defendant Contino's conduct was lawful or justified, making dismissal, inappropriate on these grounds. *See Kraushaar v. Flanigan,* [*19] 45 F.3d 1040, 1051 (7th Cir. 1995).

Defendant Contino's second argument is base on Illinois' Tort Immunity Act, which provides that a "public employee is not liable for his act or omission in the execution of enforcement of any law unless such act or omission constitutes willful and wanton misconduct." 745 ILCS 10/2-202. Willful and wanton misconduct is defined as "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others of their property." 745 ILCS 10/1-210. Defendant Contino's position that plaintiff has failed to allege such conduct in Count VI of her complaint, while technically correct, does not warrant dismissal of this Count. Throughout her complaint, plaintiff claims defendants acted intentional or willfully and wantonly. Accordingly, we find that Count VI should be allowed to stand.

C. Defendants Hunt, Hardin, and McCarty

Defendants Hunt, Hardin, and McCarty move to dismiss that portion of Count III of plaintiff's compliant brought under the *Fifth* and Ninth Amendments. With regard to the *Fifth Amendment*, the defendants point out, and [*20] plaintiff does not dispute, that the *Fifth Amendment's Due Process Clause* applies only to actions taken under the color of federal law. *Gonzalez v. City of Chicago,* 888 F. Supp. 887, 890 (N.D.Ill. 1995). As plaintiff does not allege that defendants Hunt, Hardin, and McCarty actor under the color of federal law, that portion of Count III must be dismissed.

Similarly, plaintiff does not dispute the defendants' contention that she cannot advance a claim under the Ninth Amendment. The Ninth Amendment is not a substantive source of constitutional guarantees, but is a "savings clause" drafted to avoid the lowering, degrading, or rejecting of any rights not specifically mentioned elsewhere in the *Bill of Rights*. *U.S. v. Vital Health Products, Ltd.,* 786 F. Supp. 761, 777 (E.D.Wis. 1992); *O'Donnell v. Village of Downers Grove,* 656 F. Supp. 562, 569 (N.D.Ill. 1987). The "right to privacy," which plaintiff seeks to vindicate, has been recognized as stemming from the Due Process Clause of the Fourteenth Amendment. *Planned Parenthood v. Casey,* 505 U.S. 833, , 112 S. Ct. 2791, 2804-06, 120 L. Ed. 2d 674 (1992) (collected cases at 2806); *Canedy v. Boardman,* 16 F.3d 183, [*21] 185 (7th Cir. 1994). Because she articulates no other distinct right, that portion of Count III brought under the Ninth Amendment should be dismissed. *Monitor v. City of Chicago,* 653 F. Supp. 1294, 1299 (N.D.Ill. 1987).

III. CONCLUSION

For the foregoing reasons, it is hereby recommended that defendants' motion to dismiss be GRANTED with regard to the *Fifth* and Ninth Amendment portions of Count III, and as to defendant Contino with regard to Count V.

Respectfully submitted,

EDWARD A. BOBRICK

United States Magistrate Judge

DATE: October 2, 1995

Any objections to this Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District

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[5] Plaintiff fails to respond to defendant Contino's arguments but addresses, instead, arguments that the remaining defendants might have brought.

Court's order. *Thomas v. Arn,* 474 U.S. 140, 88 L. Ed. 2d 435, 106 S. Ct. 466 (1985); *The Provident Bank v. Manor Steel Corp.,* 882 F.2d 258 (7th Cir. 1989).