

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

)	
Emmanuel Andro,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 15-13030-NMG
)	LEAVE TO FILE GRANTED 6/1/16
Town of Brookline, et al.,)	
)	
Defendants.)	
)	

**DEFENDANT TOWN OF BROOKLINE’S MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

The defendants Town of Brookline, Daniel C. O’Leary, Russell T. Lloyd, Ilya D. Gruber, Michael John McCarthy, Joseph Capuccio, Doreen Gallagher, Paul Campbell, Jennifer Paster and Ray Richards (hereinafter, those individual defendants will be referred to as “the Police Department Defendants”), by their attorney, Jonathan Simpson, Associate Town Counsel, respectfully request that this Court dismiss the claims filed against said Defendants pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

STATEMENT OF FACTS

The plaintiff is a European citizen who previously resided in the Town of Brookline. All of the Police Department Defendants are employees of the Town of Brookline Police Department. The plaintiff has had several interactions with the Town of Brookline Police Department, most notably on March 17, 2014, when he was arrested and charged with violating a restraining order. Based on the plaintiff’s status as a deportable alien, certain of the Police

Department Defendants notified Immigration and Customs Enforcement (ICE), who responded by issuing a detainer requesting that the Police Department Defendants maintain custody of the plaintiff for a period not to exceed 48 hours. The Police Department Defendants complied with the detainer, and handed off custody of the plaintiff to ICE the next day.

The plaintiff has now brought a lawsuit alleging claims against the Police Department Defendants pursuant to 42 U.S.C. §1983 for violations of his Fourth and Fourteenth Amendment rights as well as claims for negligence, false arrest and false imprisonment. The plaintiff named the Town of Brookline as an additional defendant, but has not specifically linked it to any of the individual counts.

ARGUMENT

I. The Defendant's Complaint Does Not Support a Reasonable Expectation That Actionable Claims Exist.

The plaintiff's complaint alleges serious wrongdoings by the Police Department Defendants, based on a series of unrelated encounters with the Department that all, in the plaintiff's mind, injured him in some way. However, a review of the document can lead to only one conclusion: these allegations are conclusory and ultimately unsuitable as a basis for the action the plaintiff is attempting to bring.

a. The Plaintiff's Has Not Stated Any Claim Against Defendants Doreen Gallagher, Paul Campbell, Jennifer Paster and Ray Richards.

All of the allegations and counts for relief relate to the allegedly illegal detention of the plaintiff in response to the ICE detention request, but the named defendants include a number of Department employees who had nothing to do with the plaintiff's detention. Defendant Doreen Gallagher is named because she allegedly denied the plaintiff victim privileges, while the Defendants Paul Campbell and Jennifer Paster are named because they allegedly condoned Defendant Gallagher's behavior in a subsequent conference with the plaintiff. ¶¶21-23.

Meanwhile, Defendant Ray Richards appears because he allegedly failed to allow the plaintiff to access Brookline Housing Authority property to retrieve his belongings. ¶24. These incidents, while no doubt frustrating for the plaintiff, do not warrant these individuals' inclusion in a case purportedly about an immigration detainer.

b. The Plaintiff's Complaint Lacks Sufficient Factual Assertion to Sufficiently State its Claims.

Leaving aside the clear deficiencies with respect to certain defendants and claims, the complaint is devoid of even the minimum threshold of factual allegations required to survive a motion to dismiss. To survive a motion to dismiss, a complaint must offer factual enhancement for its claims beyond mere recitations of the elements of the cause of action. United Auto., Aero., Agric. Implement Workers of Am. Int'l Union v. Fortuño, 633 F.3d 37, 41 (1st Cir.2011). In other words, there must be factual allegations sufficient to raise the allegations past the level of mere speculation. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

This is a clear problem for the plaintiff. Every single one of his claims against the Police Department Defendants is based on the specious and speculative conclusion that the Police Department Defendants executed an unlawful immigration detainer on him. But the plaintiff never even tries to demonstrate how this was the case. He does not dispute that his arrest for violating a restraining order was legitimate. He does not offer any allegations demonstrating how he was improperly classified as a deportable alien. Therefore, the only conduct undertaken by the Police Department Defendants that is even remotely connected with the plaintiff's requests for relief was their notification to ICE that they had a deportable alien in their custody and their subsequent compliance with an ICE immigration detainer request.¹ The

¹ The plaintiff's complaint alleges that the Police Department Defendants "requested to enforce a detainer" against him (¶67), but that is not how immigration detainers work; ICE requests the detainer, and the local officials choose to effectuate it.

plaintiff's only analysis of this conduct is to label it a violation of his constitutional rights. ¶67, 71. That kind of conclusory pleading is insufficient to state a claim, and is the proper subject of a motion to dismiss. Dantone v. Bhaddi, 570 F.Supp.2d 167, 171 (D.Mass.2008).

II. The Plaintiff's Negligence and False Arrest/False Imprisonment Claims Are Barred by the Massachusetts Tort Claims Act and the Doctrine of Sovereign Immunity.

The plaintiff's complaint includes several state law claims in tort against the Police Department Defendants for negligence and false arrest/false imprisonment. These claims are barred by Chapter 258 of the Massachusetts General Laws, also known as the Massachusetts Tort Claims Act. Pursuant to §2 of that statute, "no ... public employee shall be liable for any injury or loss of property or personal injury or death caused by his negligent or wrongful act or omission while acting within the scope of his office or employment." There is no allegation that the Police Department Defendants were acting outside the scope of their office or employment when they performed the actions alleged in the Complaint. Therefore, this immunity from suit shields them from liability in federal court on the claim for negligence. Rivera v. Comm. of Mass., 16 F.Supp.2d 84, 87 (D.Mass. 1998). The claim for false arrest/false imprisonment is also barred by the MTCA, but by a different mechanism: pursuant to §10(c) such claims are excluded from even the limited exception to sovereign immunity provided by the MTCA. See Massachusetts General Laws c. 258, §10 ("The provisions of sections one to eight do not apply to...(c) any claim arising out of an intentional tort, including assault, battery, false imprisonment, false arrest...").

The plaintiff has also named the Town of Brookline, the employer of the Police Department Defendants, as a defendant. While under certain circumstances agencies of the Commonwealth such as the Town of Brookline waive their sovereign immunity and consent to

suits in tort, a suit in federal court is not one of those circumstances. Caisse v. DuBois, 346 F.3d 213, 218 (1st Cir.2003).

Even if the Court were to find that the plaintiff negligence and false arrest/false imprisonment claims are not barred outright, they should be dismissed for failure to follow the MTCA presentment requirements found in M.G.L. c. 258, §4, which states, in pertinent part, that “[a] civil action shall not be instituted against a public employer on a claim for damages under this chapter unless the claimant shall have first presented his claim in writing to the executive officer of such public employer within two years after the date upon which the cause of action arose, and such claim shall have been finally denied by such executive officer in writing and sent by certified or registered mail, or as otherwise provided by this section;” Failure to abide by this presentment requirement is grounds for a motion to dismiss pursuant to Rule 12(b)(6). Hankey v. Town of Concord-Carlisle, 136 F.Supp.3d 52, 74 (D.Mass.2015).

The plaintiff’s claims for negligence and false arrest/false imprisonment cannot extend liability to the Town or the Police Department Defendants, and must be dismissed in their entirety.

III. Qualified Immunity Shields All of the Police Department Defendants from the Defendant’s Claims Brought Pursuant to §1983.

All of the Police Department Defendants are local public officials, and, as such, enjoy protection from civil liability in actions brought pursuant to §1983 “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Cortes-Reyes v. Salas-Quintana, 608 F.3d 41, 51 (1st Cir. 2010)(quoting Pearson v. Callahan, 555 U.S. 223, (2009)). When a claim of qualified immunity is made in the context of a motion to dismiss, the court must investigate whether, “taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s

conduct violated a constitutional right” and, if so, “whether the right was clearly established” at the time of the alleged acts. Saucier v. Katz, 533 U.S. 194, 201 (2001).

As noted above, the plaintiff’s complaint lacks many important details integral to his allegations, and this list includes any allegations establishing how either: (1) the officers’ conduct violated an actual constitutional right, and (2) if so, how this right was clearly established. Such a right is only “clearly established” if caselaw demonstrates that “materially similar conduct was unconstitutional,” or if there is a previously identified general constitutional principle that applies “with obvious clarity to the specific conduct at issue.” Jennings v. Jones, 499 F.3d 2, 16 (1st Cir. 2007). The plaintiff has not demonstrated how complying with a request from ICE to detain a deportable alien for less than a day when that individual is already in police custody for a criminal charge unrelated to his immigration status violates a clearly established right. With respect to the allegations against the defendants that are unrelated to the immigration detainer (Defendants Gallagher, Campbell, Paster and Richards), there has not even been a demonstration that their actions violated a constitutional right at all.

While the standards of proof necessary to survive a motion to dismiss are generous, the plaintiff’s complaint falls short of even those, especially when considering how the First Circuit has acknowledged how, in the context of a qualified immunity defense “courts must not define the relevant constitutional right in overly general terms, lest they strip the qualified immunity defense of all meaning.” Velez-Diaz v. Vega-Irizarry, 421 F.3d 71, 78 (1st Cir.2005)(quoting Butera v. District of Columbia, 235 F.3d 637, 646 (D.C. Cir.2001)). Applying the doctrine of qualified immunity at this point in the plaintiff’s suit is appropriate and fits squarely within the goals of the doctrine: balancing the need to protect the rights of citizens with the need to shield officials who are required to exercise personal discretion within the performance of their duties.

See Anderson v. Creighton, 483 U.S. 635 (1987). Based on the qualified immunity enjoyed by the Police Department Defendants, Counts IV, V and VI of the plaintiff's Complaint should be dismissed inasmuch as it applies to them.

CONCLUSION

For the foregoing reasons, the Town of Brookline and the individual Police Department Defendants respectfully request that the Court dismiss all claims against them and enter judgment in their favor.

Respectfully submitted,

/s/ Jonathan Simpson
Jonathan Simpson (BBO # 660841)
333 Washington Street
Brookline, MA 02445
(617) 730-2190
jsimpson@brooklinema.gov

Date: June 30, 2016

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2016, this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and a paper copy will be sent to the plaintiff at the following address:

Emmanuel Andro, pro se
1764 Dorchester Avenue, #2
Boston, MA 02124
(617) 596-1614

/s/ Jonathan Simpson

Jonathan Simpson