



SHEFF v. CITY OF NEW YORK

2004 | Cited 0 times | S.D. New York | March 23, 2004

OPINION AND ORDER

Douglas Sheff ("Sheff") has brought suit pursuant to 42 U.S.C. § 1983 ("Section 1983") seeking compensatory and punitive damages against the City of New York ("City"), Robert Morgenthau, the District Attorney of New York County ("DA"), various current and former Assistant District Attorney's ("ADAs") from the DA's office, and Thomas Foltin ("Foltin"),¹ a police officer, in connection with criminal charges that were filed against him but ultimately dismissed. He alleges that the defendants conspired against him to deprive him of a jury trial and to present false testimony against him, that they maliciously prosecuted him and falsely charged him, and that the DA and supervisory ADAs were negligent in their training and supervision of subordinate ADAs.

The DA and the ADAs have filed a motion to dismiss the claims against them under Rules 12(b)(1) and 12(b)(6), Fed.R.Civ.P. Foltin has also moved to dismiss the allegations against him under Rules 12 and 56, Fed.R. Civ. P. For the following reasons, the motions are granted in part and denied in part.

Background

Sheff was charged in February 1997 with harassing his former girlfriend. That charge was eventually dismissed. Sheff was charged in June 1997 with harassment and violating an order of protection. Although convicted on those charges at trial, the conviction was overturned on appeal. The relevant details behind these events, as alleged by the plaintiff, or as reflected in the documents which are integral to his complaint, follow.

The February 10, 1997 arrest; Complaint 834

On February 10, 1997, Sheff was arrested on charges that he had left telephone messages at his ex-girlfriend's apartment ("Gibson") for the purpose of annoying and harassing her by asking for the return of his personal belongings and by asking her to have her friends stop calling him. The case was assigned to Unit 30 in the DA's Office and given misdemeanor complaint number 97NO26834 ("834").

Gibson asked a friend Edward Stancik ("Stancik"), a former ADA and then Special Investigator for the New York City Public School System, to intervene with the DA's Office to insure that Sheff was prosecuted. Stancik asked his friends, defendant ADAs Klein and Murray, to have the case transferred to them in Unit 50.



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As of March 17, Unit 50 was handling the case. At a court appearance on that day, the state court judge dismissed the case, but stayed the dismissal for 30 days to permit a superceding complaint to be filed that would include Sheff's statements that were alleged to constitute harassment. Sheff alleges that the judge also said that it was crazy to charge Sheff. On April 17, Unit 50 filed a superceding complaint. Sheff alleges that the case was restored through an improper ex parte proceeding and without an unsealing order. On May 6, the complaint was dismissed by the court.

On June 13, in an ex parte proceeding, the court vacated the May 6 dismissal. According to the minutes of the court proceeding, the ADA had notified defense counsel that a superceding information was being filed but defense counsel was unable to appear. The court placed the matter on the June 16 calendar so that defense counsel could appear and be heard.

The June 16, 1997 Order of Protection

On June 16, at a proceeding attended by defense counsel, the court issued an order of protection against Sheff, directing him to stay away from and to refrain from harassing Gibson and her son from June 13, 1997 until July 31, 1997. After the order was issued, ADA Klein, who was normally a homicide prosecutor, presented the court with a letter from Stancik which indicated that Stancik feared for Gibson's life. On June 24, Sheff alleges that ADA Kobre appeared ex parte and asked that a second order of protection be issued to prohibit Sheff from making telephone calls to Gibson.

The June 26, 1997 Arrest; Complaint 394

On June 26, Sheff surrendered and was arrested and jailed until the following day. Sheff was charged in misdemeanor complaint number 97NO62394 ("394") with two counts of aggravated harassment in the second degree based on the allegations that on June 17 Gibson had received a telephone call at home shortly after midnight in which the caller did not speak. The complaint alleged that Sheff admitted to Gibson that he had made the call, that telephone records showed the call came from Sheff's home, and that the call violated the June 16 order of protection. The complaint included allegations of other conduct by Sheff which had caused Gibson to fear that he would harm her physically.

Sheff alleges that defendant ADA Kobre lied in a footnote in papers filed to oppose Sheff's motion to dismiss complaint 394. The footnote reads as follows: For example, the defendant claims to have dialled [sic] the complainant's number on the morning of June 17, 1997 by mistake, and to have hung up before the complainant answered. The People allege instead that the defendant reached the complainant and said 'hello' several times before the complainant hung up the phone. This is an issue of fact for the jury to decide. (Emphasis in original.) At trial, ADA Kobre was asked by defense counsel to stipulate that Gibson had made an inconsistent statement. Kobre explained that he had transposed the words defendant and complainant in the footnote. The footnote should have stated that the complainant said "hello" several times before hanging up the phone.



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As reflected in the record for proceedings on April 17, 1998, Complaint⁸³⁴ was dismissed on speedy trial grounds and a trial was ordered on Complaint 394. The court ordered a hearing to determine if Sheff had been served with the June 16 order of protection. Page 6

Misconduct Prior to Trial

At a hearing on September 14, the court refused to sign a subpoena for Gibson's American Express records, which Sheff hoped would show that Gibson had sent Sheff's daughters two books. Sheff contends that between April and November 1998, ADAs in Unit 50 improperly opposed the subpoena by moving to quash it.

Sheff alleges that prosecutors failed to give him Brady material in discovery, to wit, notes from a Vermont police officer reflecting Gibson's request that the officer lie, and a speeding ticket reflecting that Gibson was not in New York on March 19, 1997, at a time she said that Sheff had called her. At some point between April and November 1998, a law clerk told Sheff's attorney that ADA Kobre had met ex parte with the judge and submitted an ex parte motion. In November, ADA Klein told Sheff's attorney that Gibson was not mentally fit.

November 1998 Conviction

On November 24, ADA Kobre lowered the charges against Sheff to an attempt, thereby depriving Sheff of a right to a jury trial. On November 28, Justice Paul Feinman found Sheff guilty on both counts and sentenced him to a conditional discharge. ADAs Kobre and Jaffe were trial counsel. ADAs Klein and Murray attended the trial.

Post-trial Misconduct

Sheff appealed his conviction. In responding to Sheff's pro se Page 7 post-judgment motions, the prosecutors allegedly lied. ADA Jaffe also called Sheff's attorney and asked for negative material about Sheff to include in the response.

Sheff alleges that in March 2000, the DA's Office provided Sheff with certain Gibson telephone records that it had not produced at trial. These records demonstrate that Gibson was not in New York when she testified that Sheff had called her in New York.²

Foltin's Admissions of Wrongdoing

On August 4, 2000, Foltin told Sheff that he deserved to be found guilty. Foltin had served Sheff with the order of protection. Foltin revealed that ADA Kobre and Gibson's attorney had told Foltin to testify that Sheff had acted weird and nervous when served with the order. Foltin reported that ADA Kobre had admitted that the charges against Sheff had been lowered because a jury would not convict



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Sheff. On July 21, 2001, Foltin did not arrest Sheff for driving with a suspended registration because, as Foltin admitted, he had lied at trial.

December 2001 Reversal

On December 4, 2001, the Appellate Division reversed Sheff's conviction on the ground that there was insufficient evidence that calling Gibson and then hanging up was an attempt to communicate. "Defendant's conduct in dialing the complainant's telephone number and hanging up without completing the call after an unspecified number of rings did not constitute an attempt to 'communicate' with the complainant within the meaning of Penal Law § 240.30(1)." *People v. Sheff*, #00-292, 97NO62394 (1st Dep't 2001).

Discussion

Sheff pleads four causes of action pursuant to Section 1983 against the DA and the ADAs in both their official and personal capacities. First, Sheff alleges that the defendants conspired to deprive him of a right to a jury trial and to convict him through the false testimony of Foltin. Second, Sheff alleges that the defendants maliciously prosecuted him by filing Complaint 394 and by providing false testimony and withholding important information from the court. Third, in connection with Complaint 834, Sheff alleges that defendants maliciously prosecuted him by falsely charging him without probable cause, providing false testimony, and withholding vital information from the court, and that they violated his First Amendment right to free speech by prosecuting him for asking for his possessions in a non-threatening manner. Finally, he alleges that the City, the DA, and supervisory ADAs Ryan, Murray and Klein were negligent in their training and supervision of ADAs; that the DA and these supervisory ADAs deprived him of a right to a jury trial through a practice in the DA's Office of lowering charges to Page 9 misdemeanors; and that the DA allows ADAs to do favors for friends, improperly helped Stancik get his job, and hires the children of the rich and powerful at the expense of better qualified candidates.

With respect to Foltin, Sheff alleges that he violated Section 1983 when he testified falsely as to Sheff's reaction when served with the order of protection. Sheff also claims that Foltin is liable under Section 1983 for conspiring with the prosecutors to provide the false testimony. Sheff seeks \$1,000,000 in compensatory damages from each of the defendants, as well as punitive damages.

Notice pleading under Rule 8(a)(2), Fed.R. Civ. P., requires only a "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (citation omitted). See *Phelps v. Kapnolas*, 308 F.3d 180, 186 (2d Cir.2002) (applying the liberal notice standard when evaluating a motion to dismiss a Section 1983 claim).

When considering a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6), Fed.R. Civ. P., a court must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of



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the plaintiff. See, e.g., *Sec. Investor Protection Corp. v. BDO Seidman, LLP*, 222 F.3d 63, 68 (2d Cir. 2000). "Dismissal is inappropriate unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him or her to relief." *Raila v. United States*, Page 10355 F.3d 118, 119 (2d Cir. 2004). Where, as here, a plaintiff is proceeding pro se, the court has an obligation to "construe pro se pleadings broadly, and interpret them to raise the strongest arguments that they suggest." *Cruz v. Gomez*, 202 F.3d 593, 597 (2d Cir. 2000) (citation omitted).³ This is "especially true" when the pro se complaint alleges civil rights violations. *Weixel v. Bd. of Educ. of New York*, 287 F.3d 138, 146 (2d Cir. 2002).

1. Official Capacity

In the caption to the complaint, Sheff indicates that this suit is brought against the individual defendants in their official capacities as government employees.⁴ "A claim for damages against state officials in their official capacity is considered to be a claim against the State and is therefore barred by the Eleventh Amendment." *Davis v. New York*, 316 F.3d 93, 101 (2d Cir. 2002) (citation omitted). Eleventh Amendment Page 11 immunity extends to district attorneys in certain circumstances. "When prosecuting a criminal matter, a district attorney in New York State, acting in a quasi-judicial capacity, represents the State not the county," and is protected by the Eleventh Amendment. *Baez v. Hennessy*, 853 F.2d 73, 77 (2d Cir. 1988). See also *Rodriguez v. Weprin*, 116 F.3d 62, 66 (2d Cir. 1997).

When it comes, however, to issues concerning "the administration of the district attorney's office," the district attorney is treated as a municipal official and not as a state official. *Ying Jing Gan v. City of New York*, 996 F.2d 522, 536 (2d Cir. 1993). See also *Meyers v. County of Orange*, 157 F.3d 66, 77 (2d Cir. 1998); *Pinaud v. County of Suffolk*, 52 F.3d 1139, 1153 n.14 (2d Cir. 1995); *Walker v. City of New York*, 974 F.2d 293, 301 (2d Cir. 1992). In any event, a suit against a government official acting in his official capacity is construed as a way of pleading an action against the entity of which the official is an agent. See *Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Kentucky v. Graham*, 473 U.S. 159, 165 (1985); *Pinaud*, 52 F.3d at 1153.

Each of the claims brought against the individual defendants must be dismissed to the extent that they are brought against these defendants in their official capacity. To the extent the claims against the DA and the ADAs concern the administration of the DA's office, they will be considered as filed against the City. Each of the claims against Foltin in his official capacity will also be considered as filed against the City. Page 12

2. Absolute Immunity

The defendants other than Foltin move to dismiss the claims brought against them in their individual capacities on the ground that they are protected from a suit for damages by the doctrine of absolute immunity. This prong of the defendants' motion requires an analysis of the functions that these defendants performed that gave rise to the plaintiff's claims.



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When prosecutors are sued for damages in their individual capacity, they may be entitled to either absolute or qualified immunity. *Ying Ging Gan*, 996 F.2d at 529. "The doctrine of absolute prosecutorial immunity creates a formidable obstacle for a plaintiff seeking to maintain a civil rights action against a district attorney." *Pinaud*, 52 F.3d at 1147. To determine whether a prosecutor is entitled to absolute immunity courts "apply a functional approach, examining the nature of the function performed, not the identity of the actor who performed it." *Doe v. Phillips*, 81 F.3d 1204, 1209 (2d Cir. 1996) (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993)). Prosecutors have absolute immunity from damage claims "arising out of prosecutorial duties that are intimately associated with the judicial phase of the criminal process." *Parkinson v. Cozzolino*, 238 F.3d 145, 150 (2d Cir. 2001) (citation omitted). See also *Bernard v. County of Suffolk*, 356 F.3d 495, 502 (2d Cir. 2004); *Doe*, 81 F.3d at 1209. The doctrine protects a defendant from damages "regardless of the wrongfulness of his motive or degree of injury caused." *Bernard*, 356 F.3d at 503. In contrast, Page 13 "[w]hen a prosecutor is engaged in administrative or investigative activities, he is entitled only to qualified immunity." *Pinaud*, 52 F.3d at 1147. See also *Parkinson*, 238 F.3d at 150.

The first claim concerns principally Sheff's right to a jury trial and Foltin's alleged perjury. The prosecutors are entitled to absolute immunity on both of these allegations. See, e.g., *Bernard*, 356 F.3d at 504; *Parkinson*, 238 F.3d at 150; *Dory v. Ryan*, 25 F.3d 81, 83-84 (2d Cir. 1994).

Insofar as this motion concerns his second and third claims, Sheff has identified the following seven acts by the DA and the ADAs which he asserts occurred during the investigative stage of the prosecution against him, and which he characterizes as investigative or administrative acts which would entitle the defendants to at most qualified immunity.

1. Charging Sheff despite having been told by a police department lieutenant that Sheff's conduct did not constitute probable cause for an arrest.
2. Charging Sheff with a crime despite having told a colleague that Sheff did not commit a crime.
3. Requesting that the court amend the order of protection.
4. Charging an innocent person with a crime and changing the DA's unit to which the case was assigned because of a request from a friend, that is, Stancik.
5. Reducing the charges against Sheff to avoid a trial by jury. Page 14
6. Including allegations in a complaint that Sheff had telephoned Gibson twenty times after being told not to do so, but omitting from the complaint that Gibson called Sheff as often and had shared a ski house with him while they were dating.
7. Filing charges against Sheff despite knowledge that Gibson had asked a police officer to fabricate



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evidence against Sheff.

With the possible exception of the charge that ADAs Klein and Murray improperly changed the unit in the DA's office to which the Sheff prosecution was assigned, each of these charges concerns a prosecutorial function for which the defendants are entitled to absolute immunity. Each of these acts are decisions by the district attorney's office regarding what charges to bring against Sheff and how to prosecute him.

Although not expressly stated in his causes of action, the allegation in Sheff's complaint that ADAs Klein and Murray improperly changed the unit in the DA's office to which the Sheff prosecution was assigned is arguably connected to initiating a prosecution and presenting the state's case. See *Zahrey v. Coffey*, 221 F.3d 342, 347 (2d Cir. 2000) ("The line between a prosecutor's advocacy and investigating roles might sometimes be difficult to draw."). On the other hand, it may be appropriate to characterize this act as administrative. Because the defendants have not yet specifically addressed this issue, it is premature to decide that the defendants are entitled to absolute immunity for this transfer. Page 15

The fourth claim concerns the supervision of subordinate ADAs responsible for Sheff's prosecution and various policies of the DA's office or of the DA. To the extent the supervision or policies concern the prosecutorial decisions for which the ADAs have absolute immunity, then those derivative allegations against supervisors must also be dismissed on the ground that the supervising district attorneys have absolute immunity for the prosecution-related decisions of their subordinates and because Section 1983 supervisory liability depends upon the existence of an underlying constitutional violation. See, e.g., *Poe v. Leonard*, 282 F.3d 123, 142 (2d Cir. 2002); *Ying Jing Gan*, 996 F.2d at 536-37.

The supervising district attorneys have absolute immunity for their subordinates' decision to charge Sheff with a crime that did not entitle him to a jury trial, and for any other actions taken by the prosecutors in charging Sheff or prosecuting him. The claim that the DA allows ADAs to do favors for friends is also within the scope of absolute immunity since this claim is directed at the decision to prosecute Sheff as a result of Stancik's alleged intervention on behalf of Gibson. Other allegations in the fourth claim, however, may concern administrative conduct and policies and be beyond the reach of the doctrine of absolute immunity. They include potentially the reassignment of Sheff's prosecution from Unit 30 to Unit 50, assisting Stancik to get his job, and the DA's hiring practices. Page 16

3. The Fourth Claim

Sheff's fourth claim asserts that the DA and supervisory ADAs Murray, Ryan, and Klein are each liable in their individual capacity for violating his rights through their conduct of various policies in the DA's Office and their failure to train and supervise ADAs. Those limited portions of the fourth claim for which the individual defendants may not have absolute immunity are listed above.



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There is no liability under Section 1983 based on a theory of respondeat superior. See *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 691 (1978); *Richardson v. Goord*, 347 F.3d 431, 435 (2d Cir. 2003).

The personal involvement of a defendant in the alleged constitutional violation is a prerequisite to an award of damages under Section 1983. *Hernandez v. Keane*, 341 F.3d 137, 144 (2d Cir. 2003).

Supervisor liability under Section 1983 can be demonstrated in one or more of the following ways

(1) actual direct participation in the constitutional violation, (2) failure to remedy a wrong after being informed through a report or appeal, (3) creation of a policy or custom that sanctioned conduct amounting to a constitutional violation, or allowing such a policy or custom to continue, (4) grossly negligent supervision of subordinates who committed a violation, or (5) failure to act on information indicating that unconstitutional acts were occurring. *Richardson*, 347 F.3d at 435 (citation omitted).

The defendants have moved to dismiss any surviving portions of the fourth claim by arguing that only the DA himself may set policy for the DA's office. This argument is customarily made by the City since it derives from the doctrine of municipal liability articulated in *Monell* and its progeny. So long as the other requirements for a Section 1983 claim are met, an individual defendant may be liable under Section 1983 in her individual capacity even if she is not the final decision-maker authorized to set a policy for the DA's office or for the City.

4. Police Officer Foltin

Sheff charges that Foltin violated Section 1983 by committing perjury at trial when he testified falsely about Sheff's reaction to being served with the order of protection. Police officers may not be held liable under Section 1983 for perjurious testimony. See, e.g., *Briscoe v. LaHue*, 460 U.S. 325, 346 (1983); *Sykes v. James*, 13 F.3d 515, 519-20 (2d Cir. 1993).⁵ Foltin is not, however, immune from Section 1983 liability for the allegation that he conspired with the prosecutors to present false testimony. While prosecutors have absolute immunity "not just for the presentation of testimony, but . . . for all actions relating to their advocacy," police officers are not immune from extra-judicial actions such as an alleged conspiracy to present false testimony. *Dory*, 25 F.3d at 83. Foltin's motion for summary judgment on this single, remaining claim against him is premature. Page 18

Conclusion

The motions to dismiss plaintiff's claims by District Attorney Robert Morgenthau, Assistant District Attorneys Nancy E. Ryan and Warren Murray, former Assistant District Attorneys Steven J. Kobre, Doreen Klein, and Elena Jaffe, and Police Officer Thomas Foltin are granted in part.

SO ORDERED.

1. Sheff's complaint incorrectly spelled Foltin's last name.



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2. The trial record shows that certain Gibson telephone records were received in evidence at trial.

3. The DA and the ADAs argue in their reply brief that Sheff's claims should be dismissed under the principles of res judicata and collateral estoppel because certain of Sheff's claims have been dismissed by the Honorable Richard M. Berman in an action arising out of the same events that are the subject of the instant case. Because Sheff has not had an opportunity to address this new argument, it is not considered. In a similar vein, it is unnecessary to address the argument that Sheff's third claim is barred by the applicable statute of limitations because the claim is dismissed on other grounds.

4. Since Sheff's complaint does not seek injunctive "relief properly characterized as prospective," *Ford v. Reynolds*, 316 F.3d 351, 355 (2d Cir. 2003) (citation omitted), there is no need for this Court to engage in an analysis under *Ex parte Young*, 209 U.S. 123 (1908), and its progeny.

5. Sheff's opposition to Foltin's motion to dismiss can be read to assert for the first time that Foltin was a complaining witness against Sheff. Documents integral to the complaint, however, show that Gibson was the complaining witness in this matter.

