

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

EDWARD M. LILLY,

Plaintiff,

v.

JEFFREY SWICK, TOWN OF LEWISTON, et al.
DAVID M. HEIM, TOWN OF WHEATFIELD, et al.

Defendants,

Docket No. 19 CV 176

=====

**MEMORANDUM OF LAW FOR DEFENDANTS TOWN OF
WHEATFIELD AND DAVID M. HEIM**

=====

LAW OFFICES OF JOHN WALLACE
*Attorneys for the Defendants David Heim and the
Town of Wheatfield*

Mailing Address: PO Box 2903 Hartford,
Connecticut 06104-2903

Physical Address: 60 Lakefront Blvd., Suite 102
Buffalo, New York 14202
716-855-5729

ALYSON C. CULLITON
Of Counsel

=====

PRELIMINARY STATEMENT

Plaintiff commenced this lawsuit against Defendants Town of Wheatfield and David M. Heim (as Town of Wheatfield prosecutor and as an individual), among others, on February 7, 2019 for various civil rights violations under state and federal law. The Complaint alleges that Defendant David M. Heim and the Town of Wheatfield violated the Plaintiff's state and federal civil rights stemming from a single incident on May 31, 2016.

The incident in question on May 31, 2016 involved a hearing on Plaintiff's Vehicle and Traffic ticket, as to be adjudicated by the Defendant Town of Wheatfield. The Defendant Town of Wheatfield, had its prosecutor, Defendant David M. Heim, review and prosecute Plaintiff's ticket in question. Plaintiff claims he was "seized" by the prosecutor and that Defendant Heim was "a willing participant in further retaliation." Exhibit A at ¶ 82, 83. Plaintiff further claims that Defendant Heim's "requesting plaintiffs drivers license abstract" and entering "no plea" on a disposition slip were further improper acts. Id. at ¶ 84 and 85.

As the Town of Wheatfield is a municipality within New York State, NYS CPLR and NYS General Municipal Law applies to all state claims in this action. NYS CPLR § 215(3) provides a statute of limitations of one year with regards to all claims of false imprisonment, malicious prosecution, libel, slander, false words causing special damages and/or a violation of the right of privacy. In addition, NYS Gen. Mun. Law § 50 also provides a statute of limitations for actions against a municipality, articulating that such is be "commenced within one year and ninety 90 days from the happening of the event upon which the claim is based." Gen. Mun. Law § 50-i(1).

First and foremost, this action was commenced beyond the prescribed statute of limitations under both the CPLR and the Gen. Mun. Law. The incident date was **May 31, 2016** and the Complaint was filed on **February 7, 2019**. As such, this matter should be dismissed.

Secondly, NYS Gen. Mun. Law § 50 requires that notice be given to the municipality by a claimant of the incident and that a hearing takes place, within 90 days of the incident, regarding the facts and allegations made in the Notice. While Plaintiff did Notice the Defendant Town of Wheatfield, Plaintiff failed to appear for the required 50-h hearing as scheduled by the Town of Wheatfield's representatives. Therefore, Plaintiff Lilly does not have the mandated and prerequisite statutory compliance necessary to proceed with this action. The failure of Plaintiff to submit to a 50-h examination is fatal to Plaintiff's state claims against Defendants David M. Heim and the Town of Wheatfield.

In addition, the Defendants David M. Heim and the Town of Wheatfield submit that the Plaintiff's allegations regarding any civil rights claim should similarly be dismissed due to Defendant David M. Heim's prosecutorial immunity. All allegations against Defendant Heim were made regarding his conduct in and around the prosecution of a Vehicle and Traffic ticket on May 31, 2016. Defendant Heim's conduct stemming from his prosecutorial duty cannot be the basis of a civil suit.

Finally, to sustain a claim under § 1983 against the Town of Wheatfield, as to Plaintiff's federal civil rights, Plaintiff is required to demonstrate more than a single event/single rights violation. As Plaintiff's Complaint has failed to allege a pattern and/or a subversive practice by the Defendant Town of Wheatfield, such claims cannot be sustained under this theory.

ARGUMENT

Legal Standard

In adjudicating a Defendants motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court is entitled to consider the following:

(1) Facts alleged in the complaint and documents attached to it or incorporated by reference;

- (2) Documents ‘integral’ to the complaint and relied upon in it, even if not attached or incorporated by reference;*
- (3) Documents or information contained in defendant’s motion papers if plaintiff has knowledge or possession of the material and relied on it in framing the complaint;*
- (4) Public disclosure documents required by law to be, and that have been, filed with the Security and Exchange Commission; and*
- (5) Facts of which judicial notice may properly be taken under Rule 201 of the Federal Rules of Evidence.*

Coggins v. County of Nassau, 988 F. Supp. 2d 231 (E.D.N.Y. 2013). The Defendants submit that the Defendants David M. Heim and the Town of Wheatfield’s Notice of Claim and subsequent correspondence to and from the Plaintiff may be considered as part of their motion.

Plaintiff’s State Law Claims

It is notable that “state claims brought under state law in federal court are subject to state procedural rules.... Thus New York County Law § 52 applies...and incorporates the statute of limitations and notice of claim requirements in NY General Municipal Law §§ 50-e and 50-i.” Id. at 250. This is applicable to the case at hand.

Plaintiff filed suit regarding the incident of May 31, 2016 on February 7, 2019. This is **almost three years** (32 months) *after* the incident in question occurred. New York CPLR § 215(3) provides for a one-year limitation period for actions based on intentional torts of false imprisonment and malicious prosecution. The Plaintiff is time barred from asserting these claims against the Defendant David M. Heim and the Town of Wheatfield in this matter.

Similarly, under NY Gen Mun. § 50-I, the statute of limitations for actions against a municipality is prescribed at one (1) year and ninety (90) days. Again, the Plaintiff is time barred from asserting claims against Defendant Town of Wheatfield and its employee Defendant David M. Heim in this matter.

In addition, Plaintiff failed to comply with the hearing requirement under 50-h. As evidenced by **Exhibits B-I**, upon receipt of Plaintiff's Notice of Claim, there were multiple attempts by counsel for the Town of Wheatfield to schedule the 50-h examination of claimant. Exhibits F and G demonstrate claimant unwillingness to go forward with same. No reason was given by the claimant for the repeated cancellation and/or adjournments. The Town of Wheatfield attempted to accommodate the Plaintiff, even allowing for an extension of time outside the prescribed 90 day period to hold said 50-h examination. However, to date, no 50-h examination has occurred.

Where "a party...has failed to comply with a demand for examination pursuant to General Municipal Law 50-h [he] is precluded from commencing an action against a municipality." NYS Gen. Mun. Law § 50-h. If the Plaintiff failed to appear and/or requested an adjournment or postponement beyond the initial 90 day period, the action "cannot be commenced until compliance with the demand for examination" has occurred. N.Y. Gen. Mun. Law § 50-h(5). *See Scalzo v. County of Suffolk*, 306 A.D.2d 397 (2nd Dept. 2003) *holding* "since a General Municipal Law 50-h hearing was adjourned at the plaintiff's request, and the plaintiff commenced this action without rescheduling a new hearing date after the law adjournment..." dismissal was appropriate. *See also Maggio v. Palmer*, 810 F. Supp. 50 (EDNY 1993) *holding* a dismissal of a complaint appropriate "where plaintiff had received four adjournments regarding her 50-h deposition and then failed to show up for the last scheduled date." Defendant's consent to adjournments does not establish a waiver of defendants' rights to examine plaintiff. *Id.* at 52.

The Complaint fails to articulate and/or state any actions on the part of David M. Heim in his personal or individual capacity. The allegations in this case against David M. Heim all stem solely from his actions as Wheatfield Town Prosecutor. *See Exhibit A, ¶¶ 76-85.* As such, all Plaintiff's allegations regarding David M. Heim's conduct are actions that are subject to

prosecutorial immunity. Prosecutorial immunity is an “absolute privilege” and includes any acts relating to a prosecutor’s advocacy (regardless of motive), which may include “discretionary acts taken within the ambit of official duties.” Calderon v. County of Westchester, 111 AD2d 208 (2nd Dept. 1985).

The allegations against Defendant Heim involve meeting with Plaintiff regarding the prosecution of a traffic ticket. Plaintiff alleges that he was unlawfully seized by Defendant Heim, malicious prosecution (including a request for Plaintiff’s driver’s license abstract), and that Defendant Heim falsely reported to the Court Plaintiff’s plea (Defendant Heim reported “no plea’ was entered” versus Plaintiff’s not guilty plea). All of these allegations fall within the absolute privilege referenced above and are therefore not actionable by the Plaintiff.

Plaintiff’s Federal Civil Rights Claims

Similar to the immunity granted to David M. Heim under New York State law, the Eleventh Amendment bars suits for damages against state officials acting in their official capacity (absent state’s consent to suit or an express or statutory waiver of immunity). U.S.C.A Const. Amends. 11. *See Parker v. Zugibe*, 2017 WL 4296795 (SDNY) at *3 *stating* “the claims asserted against [D.A. Defendants] in their official capacities would be barred by the Eleventh Amendment and the claims asserted against them in their individual capacities would be barred by the doctrine of absolute prosecutorial immunity.” *See also Giraldo v. Kessler*, 694 F. 3d 161 (2nd Cir.2012) *holding* that even investigative acts reasonably related to decisions whether or not to begin or to carry on a particular criminal prosecution, or to defend a conviction, are shielded by absolutely immunity when done by prosecutors.

This absolute immunity has been held to protect conduct such as allegedly malicious prosecution, using perjured testimony, fraudulently concealing evidence and failing to arrest, charge and prosecute others for the suspected crimes. *See Fine v. City of New York*, 529 F. 2d 70 (2nd Cir. 1975), *and Stevens v. Rifkin*, 608 F Supp. 710 (ND CA 1984). There is no question

that any allegations as to David M. Heim's behavior do not rise even to those levels considered by the Fine and/or Stevens cases, all which were protected acts by prosecutors.

Admittedly, local governments are not wholly immune from suit under federal claims pursuant to § 1983. However, the Plaintiff **must** allege that the alleged deprivation of his constitutional rights occurred as a result of an official policy and/or custom of that municipality. Monell v. Dept. of Social Services of the City of New York, 436 US 658 at 690 (1979).

Nowhere in the allegations against the Town of Wheatfield is there any policy referenced and/or custom shown as embraced by the Town that would permit suit for any federal civil rights violation by Plaintiff. Zahra v. Town of Southold, 48 F3d 674 (2nd Cir. 1995) at 685. Examples of policies and/or customs that could impose liability on the Town would include decisions of government lawmakers, acts of policymaking officials and "practices which are so persistent and widespread as to practically have force of law." Connick v. Thompson, 563 US 51 (2011). Further, to clarify, the Courts have held that a municipal policy or custom may be demonstrated "(i) by employees unconstitutional acts being official sanctioned or ordered by the municipality; and/or (ii) the existence of such widespread practice that, although not authorized by written law or express municipal policy, is so permeant and well settled as to constitute a custom or usage with the force of law; and/or (iii) the computational acts were by individuals with final policymaking authority." Chepiko v. City of New York, 2012 WL 398700 (EDNY 2012) at *13.

This has not been shown. Therefore, there is no viable federal claim that has been made against the Defendant Town of Wheatfield and the claims against that Defendant should be dismissed.

CONCLUSION

For the reasons articulated herein, and in the Affidavit of Alyson C. Culliton, sworn to on the 24th day of May, 2019, the Defendants David M. Heim, individually and in his official capacity as Town of Wheatfield prosecutor, and the Town of Wheatfield have demonstrated entitlement to a dismissal of the claims against them.

Dated: May 24th, 2019
Buffalo, New York

Respectfully submitted,

s/ Alyson C. Culliton

Alyson C. Culliton
Law Offices of John Wallace
Attorneys for the Defendant
Mailing Address: PO Box 2903 Hartford,
Connecticut 06104-2903
Physical Address: 60 Lakefront Blvd., Suite 102
Buffalo, New York 14202
716-855-5729