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United States District Court,
N.D. Texas, Dallas Division.

Oscar D. WILLIAMS, et al. Plaintiffs,
v.
KAUFMAN COUNTY, et al. Defendants.

No. 3:97–CV–0875–L. | Sept. 18, 1998.

Attorneys and Law Firms

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Opinion

FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

KAPLAN, Magistrate J.

***1** Plaintiffs and defendants have filed separate motions for summary judgment in this civil rights case. The motions have been referred to United States Magistrate Judge Jeff Kaplan for recommendation pursuant to 28 U.S.C. § 636(b).

I.

This lawsuit arises from a search warrant that was executed at the Classic Club in Terrell, Texas on the evening of April 21, 1995. Kaufman County Sheriff Robert Harris obtained the warrant from a local magistrate after he received information from a confidential informant that certain individuals were selling rock cocaine at the club. The warrant authorized law enforcement officers to search the club and "all other buildings, structures, and vehicles on said premises" for cocaine and arrest five named individuals.

The Sheriff's Department considers the execution of a narcotics warrant a "hazardous entry" because there is a substantial likelihood that weapons will be present on the scene. Moreover, large quantities of crack cocaine, marijuana, and a concealed weapon were recovered during a prior search of the club in March 1994. After that search, Sheriff Harris received an anonymous phone call threatening to "blow [his] head off" if he ever went back to the club.

The warrant was executed by a team of officers from several different Kaufman County law enforcement agencies. Sheriff Harris was on the scene and coordinated the raid. As the officers entered the building, drugs were plainly visible on the floor and tables. The officers secured the premises by handcuffing everyone present and having them lie prone on the floor. Each person was strip searched and their names were run through the police computer to check for outstanding warrants. All those who were not in possession of drugs and had no outstanding warrants were led outside and held until the search was completed. This process lasted several hours.

Plaintiffs are fifteen individuals who were detained and searched that night. With the exception of Karron Brown, none of the plaintiffs were named in the warrant. In fact, four plaintiffs were not even in the club at the time the officers entered the building. Oscar Williams and Clifford Gibson were removed from their cars on nearby streets and brought back to the club. James McDonald had just left the club and was told to return. Leonard Avery was taken from his apartment next door and brought in to be strip searched. It is the activities of Sheriff Harris and the law enforcement officers that give rise to plaintiffs' claims under federal and state law.

Defendants have filed a motion for summary judgment. They contend that the excessive force claim against Sheriff Harris fails as a matter of law because the Sheriff is not liable for the alleged conduct of the officers and, in any event, is entitled to qualified immunity. Defendants further maintain that there is no basis for municipal liability and plaintiffs cannot prove their state law claims. Plaintiffs have filed their own motion for summary judgment on the Eleventh Amendment and "good faith" defenses asserted by defendants in their answer. The parties have responded to each other's motions and presented oral argument at a hearing on September 18, 1998. This matter is now ripe for determination.

II.

***2** The summary judgment standard is well-known and need not be repeated at length. Summary judgment is proper when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of

law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A dispute is "genuine" if the issue could be resolved in favor of either party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *Thurman v. Sears, Roebuck & Co.,* 952 F.2d 128, 131 (5th Cir.), *cert. denied,* 506 U.S. 845, 113 S.Ct. 136, 121 L.Ed.2d 89 (1992). A fact is "material" if it might reasonably affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *Matter of Gleasman,* 933 F.2d 1277, 1281 (5th Cir.1991).

III.

The Court will first address plaintiffs' motion for summary judgment. Plaintiffs argue that sovereign immunity under the Eleventh Amendment and "good faith" do not shield the defendants from liability under 42 U.S.C. § 1983.

This argument is correct, as far as it goes. Local governmental entities that are not considered part of the state for Eleventh Amendment purposes are "persons" subject to liability section 1983. *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658, 98 S.Ct. 2018, 2035, 56 L.Ed.2d 611 (1978). Counties are not part of the state. *See Mt. Healthy City School Board of Education v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 572, 50 L.Ed.2d 471 (1977). Thus, to the extent Kaufman County has pleaded any defenses under the Eleventh Amendment, plaintiffs' motion for summary judgment should be granted.

However, defendants also raise the defense of sovereign immunity. This common-law doctrine protects state and local governments and officials from federal lawsuits when the state or Congress has not explicitly waived immunity with respect to a particular cause of action. *See Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 104 S.Ct. 900, 907, 79 L.Ed.2d 67 (1984). Congress has specifically waived immunity under section 1983. However, the defense is still viable with respect to plaintiffs' state law claims.

Plaintiffs also challenge defendants' claim that they "are not liable based upon their good faith execution of duties which were within the scope of their official responsibilities." (Def. Answer ¶ VIII–5). The Court questions whether this, in and of itself, constitutes an affirmative defense. Nevertheless, good faith is an element of qualified immunity under federal law and official immunity under state law. *See Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 2737, 73 L.Ed.2d 396 (1982); *Lancaster v. Chambers,* 883 S.W.2d 650, 653 (Tex.1994). Sheriff Harris has properly pleaded these immunity defenses, and plaintiffs have failed to show that these defenses are not viable as a matter of law.

Finally, plaintiffs correctly note that the Eleventh Amendment does not protect Sheriff Harris from suit in his individual or official capacity. However, the Sheriff is still entitled to invoke the defenses of qualified and official immunity. *See Kentucky v. Graham,* 473 U.S. 159, 105 S.Ct. 3099, 3105–06, 87 L.Ed.2d 114 (1985).

***3** Accordingly, plaintiffs' motion for summary judgment should be granted in part and denied in part. The motion should be granted insofar as it seeks a declaration that the Eleventh Amendment and sovereign immunity do not bar suit against defendants under 42 U.S.C. § 1983. The motion should be denied in all other respects.

IV.

The Court must now consider defendants' motion for summary judgment. Defendants argue that plaintiffs have failed to adduce sufficient evidence to support their excessive force claim under section 1983. They further maintain that: (1) there is no basis for municipal liability; (2) plaintiffs cannot prove their state law claims; and (3) Sheriff Harris is immune from suit in his official and individual capacity.

A.

As a preliminary matter, the Court must clarify the basis of plaintiffs' civil rights claim. Defendants narrowly construe the federal constitutional claim alleged in plaintiffs' first amended complaint as the use of excessive force only. Plaintiffs counter that their section 1983 claim is based on broader allegations of unreasonable search and seizure, including: (1) exceeding the scope of the warrant; (2) strip searching everyone on the premises; (3) detaining them for an unreasonable period of time; and (4) directing verbal abuse and racial epithets at them. The Court will address the excessive force claim first.

1.

Sheriff Harris argues that he is entitled to summary judgment with respect to the excessive force claim because: (1) supervisory officials are not vicariously liable for the actions of their subordinates; (2) he is

entitled to qualified immunity; and (3) plaintiffs cannot prove the essential elements of an excessive force claim. Because the Court finds the last issue dispositive, it will not address defendants' other arguments.

An excessive force case is analyzed under the "reasonableness" standard of the Fourth Amendment. *Graham v. Connor,* 490 U.S. 386, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989); *Reese v. Anderson,* 926 F.2d 494, 500 (5th Cir.1991). The Fifth Circuit has adopted a three-part test in such cases. Plaintiffs must show: (1) that they suffered injuries; (2) resulting directly and only from the use of force that was clearly excessive to the need; and (3) that the force used was objectively unreasonable. *See Knight v. Caldwell,* 970 F.2d 1430, 1432 (5th Cir.1992), *cert. denied,* 507 U.S. 926, 113 S.Ct. 1298, 122 L.Ed.2d 688 (1993). The Court must view the totality of the circumstances from the standpoint of a reasonable officer on the scene, paying particular attention to "whether the suspect pose[d] an immediate threat to the safety of the officers or others." *Graham,* 109 S.Ct. at 1872; *Sroik v. Ponseti,* 35 F.3d 155, 157–58 (5th Cir.1994), *cert. denied,* 514 U.S. 1064, 115 S.Ct. 1692, 131 L.Ed.2d 556 (1995).

Plaintiffs have failed to establish these elements by sufficient evidence to survive summary judgment. Although they allege that they were pushed, shoved, and handcuffed, there is absolutely no proof that these actions were clearly excessive to the need or objectively unreasonable. The officers suspected that drugs were being sold on the premises. They reasonably believed that weapons might be present at the scene based on past experience with the club and knowledge of the narcotics trade in general. Sheriff Harris was even threatened with physical harm if he returned to club. Under these circumstances, it was reasonable to handcuff and detain everyone on the premises until the entire operation was complete.

***4** Moreover, all but three plaintiffs suffered no physical injury. Although the Fifth Circuit has been unwilling to hold that physical injury is always necessary to state an excessive force claim under section 1983, "the ultimate question ... is ... whether the use of force was so egregious as to be constitutionally excessive, and the presence of some physical injury is certainly relevant to that determination." *Id., quoting Gumz v. Morrissette,* 772 F.2d 1395, 1401 (7th Cir.1985), *cert. denied,* 475 U.S. 1123, 106 S.Ct. 1644, 90 L.Ed.2d 189 (1986). That standard is not satisfied here.

Three plaintiffs do allege physical harm, but none has stated an actionable injury. Karron Brown contends that he exacerbated a pre-existing prostate condition by being forced to lie prone for an extended period of time. Jacquelynn Surrell alleges that she aggravated a prior arm injury when her hands were cuffed behind her back. Finally, Clifford Gibson claims that his hypertension and heart problems were aggravated by the events. The Fifth Circuit has held that the exacerbation of a pre-existing injury does not give rise to an actionable excessive force claim because the injury does not result "directly and only" from the use of force. *Wells v. Bonner,* 45 F.3d 90, 96 (5th Cir.1995).

For these reasons, defendants are entitled to summary judgment on plaintiffs' excessive force claim under section 1983.

2.

Plaintiffs also allege that defendants conducted an illegal strip search and unlawful detention, invaded their right to privacy, and verbally harassed them based on race. (Plf. First Am. Complaint ¶¶ 5.2–5.7). Because defendants have narrowly interpreted the complaint, they do not address these constitutional claims in their motion for summary judgment. For that reason alone, those claims survive summary dismissal.

Defendants do address the illegal search and unlawful detention claims in their reply. Although summary judgment cannot be based on arguments raised for the first time in a reply brief, the Court will nevertheless address the substance of defendants' arguments in an effort to narrow the issues for trial.

a.

Sheriff Harris first contends that the search and seizure and unlawful detention claims are barred under the doctrine of qualified immunity. Qualified immunity protects government officers from suit for discretionary acts performed in good faith while acting within the scope of their authority unless their conduct violates a clearly established constitutional right. *Harlow,* 102 S.Ct. at 2737; *Spann v. Rainey,* 987 F.2d 1110, 1114 (5th Cir.1993). The determination whether an officer is entitled to qualified immunity involves a two-step process. First, the Court must determine whether plaintiff has alleged a constitutional violation. *Siegert v. Gilley,* 500 U.S. 226, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991); *Hale v. Townley,* 45 F.3d 914, 917 (5th Cir.1995). If so, the Court must then determine whether the right was clearly established at the time of the incident and whether the conduct of the officer was objectively reasonable under the circumstances. *Siegert,* 111 S.Ct. at 1793; *Hale,* 45 F.3d at 917. Plaintiffs clearly have alleged the violation of a constitutional right. The Court therefore

will address only the second prong of the test.

***5** A constitutional right is clearly established when "the contours of that right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). This test focuses on the particularized circumstances confronting the officer, not on the more generalized right to be free from unreasonable searches. *See id.* at 3038–39; *Foster v. City of Lake Jackson,* 28 F.3d 425, 429 (5th Cir.1994). Thus, Sheriff Harris will not be entitled to qualified immunity if it would have been apparent to an objectively reasonable officer based on pre-existing law that the strip searches and prolonged detention violated plaintiffs' constitutional rights. *Foster,* 28 F.3d at 429. On the other hand, if officers of reasonable competence could disagree as to whether the conduct violated plaintiffs' rights, the Sheriff is entitled to qualified immunity. *Malley v. Briggs,* 475 U.S. 335, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986); *Hart v. O'Brien,* 127 F.3d 424, 444 (5th Cir.1997).

b.

Under these standards, Sheriff Harris would be entitled to qualified immunity with respect to the unlawful detention claims of the nine plaintiffs who were on the premises when the officers executed the search warrant. The occupants of a premises being searched for contraband pursuant to a valid warrant may lawfully be detained while the search is being conducted. *Michigan v. Summers,* 452 U.S. 692, 101 S.Ct. 2587, 2594, 69 L.Ed.2d 340 (1981). The search warrant itself provides the "articulable facts" necessary to detain a person on less than probable cause. *Id.* Admittedly, the Court in *Summers* reserved the question whether an unusually lengthy detention might lead to a different conclusion. *Summers,* 101 S.Ct. at 2595 n. 21. This does not abrogate the Sheriff's entitlement to qualified immunity. At most, officers of reasonable competence could disagree as to whether detaining plaintiffs for several hours while the search was being conducted violated their rights.

The Court reaches a different conclusion with respect to the four plaintiffs who were not present when the officers entered the premises. Oscar Williams and Clifford Gibson were removed from their cars on nearby streets and brought back to the club. James McDonald had just left the club and was told to return. Leonard Avery was taken from his apartment next door and brought in to be strip searched. The search warrant only authorized the officers to search buildings, vehicles, and structures "on the premises." It is highly doubtful whether the Sheriff could seize and detain these plaintiffs without probable cause and whether a reasonably prudent officer would have done so under the circumstances presented in this case.

c.

It is also doubtful whether Sheriff Harris is entitled to immunity from plaintiffs' claim that the strip searches violated their constitutional rights. These searches clearly were not permitted under the well-established authority of *Ybarra v. Illinois,* 101 S.Ct. 338 (1979). In *Ybarra,* the police had obtained a warrant to search a local bar as well as a specifically identified bartender who was suspected of selling heroin on the premises. The police executed the warrant and patted down each patron in the bar for weapons. During the pat-down of Ventura Ybarra, an officer felt what seemed to be a pack of cigarettes in his pants pocket. He removed the package from Ybarra's pocket, opened it, and discovered six tinfoil packets of heroin inside.

***6** The Supreme Court held that the search violated the Fourth Amendment:

> [A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.... Although the search warrant, issued upon probable cause, gave the officers authority to search the premises and to search [the bartender], it gave them no authority whatever to invade the constitutional protections possessed individually by the tavern's customers."

Ybarra, 101 S.Ct. at 342. It is clear that the officers did not have a particularized suspicion that any plaintiff other than Karron Brown was in possession of drugs. The principle announced in *Ybarra* is fully applicable here. If reaching into a person's pants pocket without probable cause is prohibited by the Fourth Amendment, it should

have been exceedingly clear that conducting a strip search of a person similarly situated would not be constitutionally permissible.

Defendants strenuously argue that they were executing a hazardous warrant and that there was reason to believe that weapons might be present. At most, this might authorize a pat down search for weapons. However, it is ludicrous to suggest that a highly intrusive strip search was necessary to protect the officers' safety. Sheriff Harris admitted that the officers were searching for illegal drugs. With the exception of Karron Brown, who was specifically named in the warrant, the officers did not have sufficiently particularized probable cause to believe plaintiffs were in possession of drugs. Qualified immunity does not shield the Sheriff from liability under these circumstances except with respect to Brown's claims. It should also be clear from the preceding discussion that plaintiffs' have presented sufficient evidence to create genuine issues of material fact on this claim.

B.

As for the County, Sheriff Harris testified that the search was conducted pursuant to the customary policy and practice of the Kaufman County Sheriff's Department. A local governmental entity is subject to liability under section 1983 where it has adopted a policy with "deliberate indifference" to federally protected rights that is the "moving force" behind the constitutional violation. *Snyder v. Trepagnier,* 142 F.3d 791, 795–96 (5th Cir.1998). Clearly, Kaufman County is not entitled to summary judgment as to this claim.

C.

Defendants also seek summary judgment on the pendent state claims alleged in the complaint. First, defendants correctly note that there is no common law cause of action for damages resulting from violations of the Texas Constitution. *City of Beaumont v. Bouillion,* 896 S.W.2d 143, 150 (Tex.1995); *see also Favero v. Huntsville Independent School District,* 939 F.Supp. 1281, 1296 (S.D.Tex.1996), *aff'd,* 110 F.3d 793 (5th Cir.1997). However, plaintiffs also seek a declaration that the conduct of defendants violated Article I, Section 9 of the Texas Constitution. Summary judgment is not proper as to this claim for declaratory relief.

***7** Next, defendants argue that they are entitled to summary judgment with respect to plaintiffs' state law claims of assault and battery, intentional infliction of emotional distress, and civil conspiracy. Kaufman County is clearly entitled to governmental immunity with respect to these claims. Under Texas law, a unit of state government is immune from suit except to the extent that immunity has been waived under the Texas Tort Claims Act. *City of Hempstead v. Kmiec,* 902 S.W.2d 118, 122 (Tex.App.—Houston [1st Dist.] 1995, no writ). The Tort Claims Act only waives immunity in limited circumstances. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 101.021 (Vernon 1986). Immunity is not waived for intentional torts such as those pleaded here. *Id.* § 101.057(2); *Gillum v. City of Kerrville,* 3 F.3d 117, 122 (5th Cir.1993), *cert. denied,* 510 U.S. 1072, 114 S.Ct. 881, 127 L.Ed.2d 76 (1994); *Kmiec,* 902 S.W.2d at 122.

For the same reason, Sheriff Harris is entitled to immunity insofar as the state law claims are asserted against him in his official capacity. "Suits against a governmental official in his official capacity are just another way of pleading a suit against a governmental entity of which the official is an agent." *Kmiec,* 902 S.W.2d at 122. Sheriff Harris is therefore entitled to immunity when sued in his official capacity to the same extent as Kaufman County is entitled to governmental immunity. Summary judgment should be granted on this basis.

Finally, plaintiff has failed to prove that Sheriff Harris is liable in his individual capacity for these intentional torts. There is no evidence that the Sheriff personally assaulted, battered, or intentionally inflicted emotional distress upon any of the plaintiffs. Nor have plaintiffs shown that Sheriff Harris strip searched or personally directed any racial or derogatory slurs at anyone.

Similarly, there is no evidence that Sheriff Harris conspired with Kaufman County to violate plaintiffs' rights. An actionable conspiracy consists of: (1) two or more persons; (2) an objective to be accomplished; (3) a meeting of the minds on the objective; (4) one or more overt acts; and (5) damages proximately caused by such conduct. *Massey v. Armco Steel Co.,* 652 S.W.2d 932, 934 (Tex.1983). Assuming *arguendo* that the County is a "person" capable of entering into a conspiracy, plaintiffs offer no proof of a meeting of the minds between the defendants. Several plaintiffs admitted in their depositions that they had no proof of any such agreement. They merely assumed that an agreement had been made from the fact that the raid occurred. Such unsupported speculation is not proper summary judgment evidence and cannot create a genuine issue of material fact for trial. *Topalian v. Ehrman,* 954 F.2d 1125, 1131 (5th Cir.), *cert. denied,* 506 U.S. 825, 113 S.Ct. 82, 121 L.Ed.2d 46 (1992). Kaufman County and Sheriff Harris are entitled to summary judgment with respect to the state law claims.

RECOMMENDATION

***8** Plaintiffs' motion for summary judgment should be granted in part and denied in part. The motion should be granted insofar as it seeks a declaration that the Eleventh Amendment and sovereign immunity do not bar suit against defendants under 42 U.S.C. § 1983. In all other respects, the motion should be denied.

Defendants' motion for summary judgment should be granted in part and denied in part. The motion should be granted with respect to plaintiffs' excessive force claim under 42 U.S.C. § 1983 and the pendent state claims for damages under the Texas Constitution, assault and battery, intentional infliction of emotional distress, and civil conspiracy. In all other respects, the motion should be denied.

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO OBJECT

On this date the United States magistrate judge made written findings and a recommended disposition of plaintiffs' motion for summary judgment and defendants' motion for summary judgment in the above styled and numbered cause. The United States district clerk shall serve a copy of these findings and recommendations on all parties by certified mail, return receipt requested. Pursuant to 28 U.S.C. § 636(b)(1), any party who desires to object to these findings and recommendations must file and serve written objections within ten (10) days after being served with a copy. A party filing objections must specifically identify those findings and recommendations to which objections are being made. The district court need not consider frivolous, conclusory or general objections. The failure to file such written objections to these proposed findings and recommendations shall bar that party from obtaining a *de novo* determination by the district court. *Nettles v. Wainwright,* 677 F.2d 404, 410 (5th Cir.1982). *See also Thomas v.. Arn,* 474 U.S. 140, 150, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985). Additionally, the failure to file written objections to proposed findings and recommendations within ten (10) days after being served with a copy shall bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error or manifest injustice. *Douglass v. United Services Automobile Ass'n,* 79 F.3d 1415, 1417 (5th Cir.1996).