IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 09-cv-02802-REB-MEH

JEREMY C. MYERS;
GREAT WESTERN SALAVAGE LTD.,

Plaintiffs,

v.

BRIAN KOOPMAN, Detective in the Loveland, Colorado Police department, in his official and individual capacity;
LUKE HECKER, Chief of Loveland Police Department, in his official and individual capacity;
DENNIS V. HARRISON, Chief of the Fort Collins Police Department, in his official and individual capacity;
JAMES A. ALDERDEN, Sheriff of Larimer County, Colorado, in his official and individual capacity;
City of LOVELAND, Colorado, a municipality;
City of FORT COLLINS, Colorado, a municipality;
LARIMER COUNTY, a County, by and through the LARIMER COUNTY BOARD OF COUNTY COMMISSIONERS;
LARRY ABRAHAMSON, District Attorney of the Eighth Judicial District in his official capacity; and
EIGHTH JUDICIAL DISTRICT OF COLORADO, a political subdivision of the State of Colorado,

Defendants.

PLAINTIFFS' RESPONSE TO DEFENDANTS BRIAN KOOPMAN, LUKE HECKER AND CITY OF LOVELAND'S MOTION TO DISMISS (DOCKET #14, FILED 01/07/2010)

COME NOW Plaintiffs, by and through their Attorney Randall R. Meyers, and respectfully request this Court deny Defendants Brian Koopman, Luke Hecker, and City

of Loveland's Motion to Dismiss (the Loveland Defendants) (CM/ECF Docket # 14, filed 01/07/2010). For their Response, Plaintiffs state as follows:

I. INTRODUCTION

Plaintiffs' Complaint, consisting of ninety-eight paragraphs, when read in its entirety pleads with sufficient specificity the existence of constitutional violations and that Plaintiffs' constitutional rights have been violated. Pursuant to applicable case law, this action has been timely brought and it is brought against the correct defendants. Defendants' Motion misstates or misapplies the correct federal standard of pleading and attempts to distract the Court with peripheral issues that are inappropriate or irrelevant at this time. For those reasons set forth below, the motion is without merit and should be denied.

II. ARGUMENT

A. Plaintiffs' Complaint was timely filed under the Statute of Limitations

Plaintiffs concede that the appropriate state statute of limitations to be applied in this case is two years. Plaintiffs further concede that federal law controls the determination of when a §1983 action accrues. However, Defendants' assertion that the cause of action accrued on September 6, 2007 is based on an erroneous application of a presumption not applicable to the facts of this case and relies on case law that has been superseded.

Defendants base their argument that the cause of action accrued on September 6, 2007 solely upon reliance on *Johnson v. Johnson County Commission Board*, 925 F.2d 1299 (10th Cir. 1991). That case creates only a "presumption" as to when the cause of action accrues. Several cases, including decisions of the U.S. Supreme Court, have developed a more exacting accrual standard. The Supreme Court, in *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 1264 (1994), adopted the standard that when a § 1983 action is brought seeking compensation for harm caused by "actions whose unlawfulness would render a conviction or sentence invalid," the plaintiff must show the prosecution or complaint has been invalidated before the cause of action accrues. *Heck* at 486-487. The inquiry as to when the cause accrues is "inherently a factual one." *Covington v. City of New York*, 171 F.3d 117, 122 (2nd Cir. 1999). The Tenth Circuit and the U.S. District of Colorado has followed the application of the *Heck* principle. *Beck v. City of Muskogee Police Dept.*, 195 F.3d 553, 557 (10th Cir. 1999); *Turner v. Schultz*, 130 F.Supp.2d 1216, 1222 (D. Colo. 2001). In *Turner*, the Court concluded, "Heck should apply to such situations when the concerns underlying Heck exist. ... Such claims arise at the time the charges are dismissed." *Id.* Because *Turner* establishes the groundwork for analysis of statute of limitation issues in the Tenth Circuit in § 1983 actions, further examination of *Turner*, as it applies here, is required.

Turner is a "Bivens" case, *Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999. However, the Court in *Turner* found, for statute of limitations purposes, that a *Bivens* action is like a 42 U.S.C. § 1983 action. The Defendants contend, and Plaintiffs do not disagree, that the appropriate period of

limitations here is two years. Yet, while Defendants argue that at the latest the two year period ends September 6, 2009, Plaintiffs rely on the ruling in *Turner* for the position that the two year limitation period did not run until Mr. Myers' case was dismissed, therefore November 15, 2009. Borrowing from the principles in *Turner*, Plaintiffs conclude that any finding in their favor in a civil case would call into question Mr. Myers' guilt in the criminal case that was filed against him. In this factual circumstance, *Turner* mandates the application of *Heck v. Humphrey*, *op. cit.* Citing *Heck*, the *Turner* Court states, "Thus, Heck precludes a § 1983 claim relating to pending charges when a judgment in favor of the plaintiff would necessarily imply the invalidity of any conviction or sentence that might result from prosecution of the pending charges. Such claims arise at the time the charges are dismissed." *Turner v. Schultz*, 130 F.Supp. at 1222. As late as 2007, the U.S. Supreme Court still applied the *Heck* principle, while dealing with a false imprisonment case, whose facts are not on point with the facts at hand. *Wallace v. Kato*, 549 U.S. 384, 127 S.Ct. 1091 (2007). Therefore, based upon the parameters of *Heck*, Plaintiffs' claims accrued for statute of limitations purposes on November 15, 2009, two years from the date the criminal charges were dismissed.

Applying *Heck* to the facts of this case, the search and seizure, on September 5, 2007, could have been reasonable and could have led to a conviction of Mr. Myers. Mr. Myers would have been unable to argue the unreasonableness at that time, because the prosecution was ongoing and Defendants were intent on proceeding. Mr. Myers was unaware of the false statements contained in the affidavit that was used to obtain the warrant. Mr. Myers was unaware that purported statements from a non-existent

informant were relied upon to obtain the warrant. Exculpatory evidence from the CBI lab results was withheld from Mr. Myers until the district attorney was challenged at a preliminary hearing to show what the results were. At this time the district attorney denied knowledge of the test results. Only on November 15, 2007, when the district attorney was forced to admit that the evidence obtained from the search proved nothing, and when the case was therefore dismissed, could Plaintiff have been able to purse the unreasonableness argument because only then did the decision to dismiss undermine the validity of the search. The cause of action did not accrue until November 15, 2007, and therefore Plaintiffs' Complaint was timely filed.

B. Plaintiffs' have sufficiently pled their causes of action and stated § 1983 claims

Defendants' motion to dismiss for failure to state a claim should be denied both on its merits and for failing to comply with this Court's Rules. *REB Civ. Practice Standard V.I.* Aside from the failure to include the mandatory certification (*REB Civ. Practice Standard V.I.1.*), counsel for "the Loveland defendants" failed to confer with counsel for Plaintiffs to determine whether the alleged deficiency of failure to plead with specificity could not have been corrected by an amendment. No effort, let alone an "exercise" of "best efforts to stipulate to appropriate amendments," was made, as is required. *REB Civ. Practice Standard V.I.3.a.* While Plaintiffs do not concede that amendment is necessary, as discussed below, had the parties made any effort to reach reconciliation of the issue, and been successful, this matter would not have needed to come before the Court.

Apart from the failure to comply, Defendants argument must also be rejected on substantive grounds. Defendants base their argument on the *Bell Atlantic Corp. v. Twombly* decision and subsequent cases citing that authority (See *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009). The argument is not persuasive for two reasons. First, the *Twombly* decision is not on point. *Twombly* dealt with what was required to state a claim under a class action lawsuit under the Sherman Antitrust Act. *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 554-555, 127 S.Ct. 1955, 1964 (2007). This is wholly different than an action under § 1983. The Court itself acknowledged that it was dealing with a case that "is a sprawling, costly, and hugely time-consuming undertaking." *Id*, at 560, FN6.

Defendants' use of the *Ashcroft* case that followed is also irrelevant to the facts at hand. In *Ashcroft*, the Court was faced with a twenty-one count complaint brought as a *Bivens* action under the First and Fifteenth Amendment. It was filed by a Muslim Pakistani detainee, identified as a person of "high interest" after the September 11, 2001 terrorist attack on New York, who alleged improper treatment while under confinement. In reaching its decision, the Court noted: "Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009). Neither of these cases have fact situations which provide any guidance for the case at hand.

Second, Tenth Circuit cases exist which are much closer on point in assisting this Court in its "content-specific task" of determining adequacy of pleading. While the

Robbins case cited by Defendants in their Motion is a Tenth Circuit case, it nonetheless deals with facts distinctly different from the case at hand. In *Robbins*, parents sued the Oklahoma Department of Human Services when their child died in a day care facility Department employees told them was the only day care they could use. *Robbins v. Oklahoma*, 519 F.3d 1242, 1245-46 (10th Cir. 2008). While not on point, that decision does, however, provides relevant guidance in dealing with the *Twombly* ruling. In discussing the difficulty of interpreting *Twombly*, the Court reiterated the bedrock principle that a judge ruling on a motion to dismiss must accept all allegations as true and may not dismiss on the ground that it appears unlikely the allegations can be proven. *Id.*, at 1247, *citing Twombly*, 127 S.Ct. at 1974. It also noted the Supreme Court "expressly rejected" the "heightened fact pleading" requirement. *Id.* It referenced the Supreme Court's ruling in *Erickson v. Pardus*, decided after *Twombly*, where a one sentence "general" statement was a sufficient allegation to survive a motion to dismiss. *Id.*, at 1247, FN 1, *citing Erickson v. Pardus*, 551 U.S. 89, 127 S.Ct. 2197 (2007). Finally, the *Robbins* Court concluded, in agreeing with the Third Circuit, "that the degree of specificity necessary to establish plausibility and fair notice, and therefore the need to include sufficient factual allegations, depends on context." *Id.*, at 1248.

A case closer on point and more helpful in determining this issue is the Tenth Circuit case of *Pierce v. Gilchrist*, 359 F.3d 1279 (10th Cir. 2004). There the plaintiff brought an action for § 1983 relief "resembling" common law claims for malicious prosecution. In discussing whether the complaint sufficiently pled a cause of action, the Court provided relevant insight. The defendant argued the complaint did not state with

specificity the elements of the state cause of action for malicious prosecution, and in fact did not even allege "malicious prosecution." The Court held that irrelevant, since the "actual cause of action is for a constitutional violation under § 1983" and held the "failure to plead malicious prosecution as a cause of action is therefore not fatal to his action." *Id.*, at 1286, FN 3. The Court specifically recognized that the Tenth Circuit has joined in the majority rule that "does not require a § 1983 plaintiff to prove the common law elements of malicious prosecution." *Id.*, at 1287, FN4. The "ultimate question" is the existence of a constitutional violation and whether the plaintiff has alleged violations of his constitutional rights, pursuant to § 1983. *Id.*, at 1290. Mr. Myers has clearly done that in his Complaint.

The Tenth Circuit has endorsed this position in at least two post-*Twombly* decisions and has specifically upheld the reasoning in *Pierce v. Gilchrist*. In *Mondragon v. Thompson*, 519 F.3d 1078 (10th Cir. 2008), the complaint "did not specify which laws or which provisions of the Constitution were violated." *Id.*, at 1081. The Court nevertheless allowed the case to proceed on a Fourth and Fourteenth Amendment analysis, citing the *Pierce* holding: "It is not essential that the plaintiff use the words 'malicious prosecution' to describe his due process claim." *Id.*, at 1084. In *Miller v. Spiers*, 339 Fed.Appx. 862, 2009 WL 2219256 (C.A.10 (N.M.)), decided July 27, 2009, the Tenth Circuit considered a complaint that summarily alleged the "arrest warrant and the subsequent prosecution for murder, conspiracy, and kidnapping were not supported by probable cause." *Id.*, at 867. The Court held those allegations were "sufficient, at least at this stage, to maintain his malicious prosecution claim." *Id.* Applying these

correct standards to Mr. Myers' Complaint, Plaintiffs respectfully submit they have adequately pled violations of their constitutional rights under § 1983. Defendants Motion to Dismiss should be denied. The specific arguments as to each cause of action will be briefly discussed.

1. Malicious Prosecution

In their Motion, Defendants assert Plaintiffs' claim of Malicious Prosecution is not "cognizable" under the Fourteenth Amendment. The Tenth Circuit cases cited above clearly hold otherwise. The *Pierce* Court discusses at length the constitutional analysis of fourth and fourteenth amendment claims arising out of a malicious prosecution setting. *Pierce v. Gilchrist*, 359 F.3d at 1285-1286. The Court concluded: "The initial seizure is governed by the fourth amendment, ... but at some point after arrest, and certainly by the time of trial, constitutional analysis shifts to the Due Process Clause." *Id.* The Court concluded it is not necessary to determine when one analysis ends and the other begins when, as in the case of Mr. Myers' Complaint, the complaint raises "claims under both constitutional provisions." *Id.*, at 1286. That position has been cited by numerous subsequent decisions. *Mondragon v. Thompson*, 519 F.3d at 1082; *Miller v. Spiers*, 339 Fed. Appx. at 867; *Asten v. City of Boulder*, 652 F.Supp. 2d 1188, 1197 (D. Colo. 2009). Contrary to Defendants' assertion, this is, then, no legal flaw at all.

The balance of Defendants' motion as to the malicious prosecution cause of action is also without merit, primarily because it is based on their erroneous alleged requirement of "heightened pleading standards." No such standards exist in the Tenth

Circuit as to the cause of action. Their reliance on state law cases is both unfounded and erroneous. For example, they allege as to probable cause that what matters is when the charges were filed, not what transpires through subsequent events. Such is not the law in federal court. The *Pierce* decision is controlling: "The district court, however, held that '[e]ven when probable cause is present at the time of the arrest, evidence could later surface which would eliminate that probable cause.' Op. 8. We agree with the district court. . . ." *Pierce v. Gilchrist*, 359 F.3d at 1295.

Even further off the mark is their allegation that "the Loveland defendants" do not have authority to prosecute criminal cases in district court and therefore cannot have an action for malicious prosecution brought against them. Numerous federal cases hold otherwise. Again, the *Pierce* Court set forth the correct standard. Citing the Restatement of Torts, and referring to the federal standards of Section 1983 itself, the Court concluded: "Congress was concerned not just with the officer who formally initiates the process that leads to an unconstitutional seizure, but to all those who were the 'cause' of deprivations of constitutional rights." *Pierce v. Gilchrist*, 359 F.3d at 1292. The Court was very clear as to the depth and breadth of who can be named as a defendant in a malicious prosecution claim.

> The actions of a police forensic analyst who prevaricates and distorts evidence to convince the prosecuting authorities to press charges is no less reprehensible than an officer who, through false statements, prevails upon a magistrate to issue a warrant. In each case the government official maliciously abuses a position of trust to induce the criminal justice system to confine and then to prosecute an innocent defendant. We view both types of conduct as equally repugnant to the Constitution. *Id.*, at 1293.

2. Failure to Train and Supervise

Defendants' arguments as to the failure to train and supervise cause of action also fail for the same reasons as stated above. They apply an erroneous standard of pleading to Mr. Myers Complaint, and require a heightened pleading standard that is inapplicable. The liability for failure to supervise or train can be established in different ways. "There are also a handful of theories under which an individual with supervisory authority can be held liable for a constitutional violation without directly and personally participating in it." *Watson v. Polland*, 2008 WL 3357317 (D.Colo. 2008); *citing Turner v. Schultz*, 130 F.Supp. 2d at 1226. Mr. Myers' Complaint sets forth numerous allegations that are sufficient to establish a cause of action.

The first paragraph of the Complaint identifies the Larimer County Drug Task Force (LCDTF), an entity created largely by the City and County Defendants which shields their activities under the cloak of a publicly mysterious organization, approved and supervised specifically by Defendants Hecker, Harrison and Alderden. Docket #2, ¶ 1. Defendants Hecker, Harrison and Alderden were instrumental in the formation, operation, and continuation of the LCDTF and actively participated in its activities and supervision. (Docket #2, ¶¶ 2-4). Defendants Hecker, Harrison and Alderden directly participated in the LCDTF and its activities. (Docket #2, ¶ 13). Defendant Koopman's activities were conducted under the mysterious LCDTF, sanctioned and operated by policies and practices established, endorsed and supervised by Defendants Hecker, Harrison and Alderden. Docket #2, ¶¶ 2, 3, 4, 20, 21, 23, 24, 25, and 26, for example. All actions taken by Defendant Koopman and his associates with the LCDTF were

conducted under the protective shield of the LCDTF, which oversaw their every action. As a direct result of the support Koopman received from the LCDTF, the constitutional violation occurred. (Docket #2, ¶¶ 24-26). The LCDTF was supervised and controlled, in significant part, by Defendants Hecker, Harrison and Alderden and existed at their discretion inasmuch as the LCDTF is comprised solely of law enforcement officials from participating agencies. Without this participation in personnel, the LCDTF would not exist. Their actionable behavior continued through the hearing on November 15, 2007, all supported by the training and supervision Defendant Koopman received (or did not receive) from the LCDTF and its members, including Defendant Alderden. (Docket #2, ¶¶ 37-43). Plaintiffs have clearly pled a sufficient basis to go forward on the cause of action for failure to train and supervise.

The remedy of dismissal is not appropriate even if this Court were to conclude the Complaint did not sufficiently plead a cause of action. While Plaintiff respectfully submits the Complaint is adequate, the more appropriate remedy and the remedy more in conformity with this Court's practice procedures would be to grant leave to amend the Complaint to address any determined insufficiency.

3. Conspiracy

Defendants' motion as to the conspiracy cause of action again fails to comply with this Court's rules and itself is nothing more than summary conclusions that raise no basis for dismissal. A Rule 12(b) motion must "clearly enumerate each element *that movant contends must be alleged, but was not.*" *REB Civ. Practice Standard V.3.a.1.* Defendants do not enumerate any element let alone contend Plaintiffs have failed to allege it. As such, their motion is insufficient and should be denied.

The substance of their motion on this matter is a reiteration of the *Twombly* argument of alleged heightened pleading requirements. As discussed above, that is not correct or applicable here. Plaintiffs have satisfied the requirements for pleading conspiracy in a § 1983 complaint and setting forth allegations sufficient to withstand a motion to dismiss. Plaintiff is unaware of any Supreme Court decision that has overruled the case law that has established the requirements for pleading as it relates to a conspiracy claim under § 1983. Consequently the rule remains: "To state a section 1983 conspiracy claim, a plaintiff must allege: (1) the existence of a conspiracy involving state action; and (2) a depravation of civil rights in furtherance of the conspiracy by a party to the conspiracy." *Marchese v. Umstead*, 110 F.Supp.2d 361, 371 (E.D.Pa. 2000), citing numerous cases in support.

To support the claim, the plaintiff need not plead with greater specificity than is generally required. "Here, plaintiff has pled facts sufficient to put the defendants on notice of the general period of the conspiracy, the object of the conspiracy and the alleged conduct taken in furtherance of the conspiracy." *Id.* Mr. Myers has done the

same and more. In addition to the specific allegations that cover the elements of the claim (Docket #2, ¶¶ 91-98), the Complaint must be read in its entirety. Very specific dates, actions, and allegations are set forth throughout, naming the Defendants individually as applicable and identifying the object of the conspiracy. "The Loveland defendants" motion is without merit and should be denied. As argued above, if this Court finds the complaint deficient, the matter is best addressed by granting leave to amend the complaint, not dismissal of it.

III. CONCLUSION

In addition to Defendants' failure to comply with the Rules of this Court, they raise no substantive basis for dismissal of Plaintiffs' Complaint. They ask this Court to apply standards that are not the rule in the Tenth Circuit, and use case law that is inapplicable, superseded, or easily distinguished. No heightened standard of pleading is required for the causes of action set forth in Plaintiffs' Complaint. In any event, the Complaint does state with sufficient specificity the existence of constitutional violations and that Plaintiffs' constitutional rights have been violated. Plaintiffs respectfully submit this matter should be allowed to proceed and Defendants' Motion be denied. In the alternative, should the Court deem additional pleading necessary, Plaintiffs should be granted leave to amend their Complaint to address any shortcoming identified by the Court.

WHEREFORE, Plaintiffs respectfully request the Court deny Defendants' Motion, and for any further relief the Court deems just and proper.

DATED the 28th day of January, 2010 .

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on this 28th day of January 2010, I electronically filed the foregoing Response to Defendant Brian Koopman, Luke Hecker and City of Loveland's Motion to Dismiss with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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And I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participants in the manner indicated by the non-participants name:

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