UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:09-cv-02802-REB- MEH

JEREMY C. MYERS,

Plaintiff,

v.

BRIAN KOOPMAN, Detective in the Loveland, Colorado Police Department in his official and individual capacity; and
CITY OF LOVELAND, a Colorado municipality.

Defendants.

DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

DEFENDANTS, Brian Koopman ("Koopman") and the City of Loveland, Colorado ("City") (collectively, "Defendants") by and through their attorneys, the Loveland City Attorney's Office and Wick & Trautwein, LLC, and pursuant to Fed.R.Civ.P. 12(b)(6), respectfully move the Court order dismissed Plaintiff's Amended Complaint and Jury Demand [#127] filed March 2, 2011. In support hereof, Defendants state as follows:

CERTIFICATION

Undersigned defense counsel hereby certifies, in accordance with this Court's Practice Standards, that the submitting parties have read and complied with the Practice Standards of this Court governing the formatting and marshaling of this Motion to Dismiss.

I. INTRODUCTION

As permitted by the Court's Order Concerning Motions for Summary Judgment [#126] filed February 11, 2011 at 26, ¶11, Plaintiff Jeremy C. Myers ("Plaintiff") has filed an Amended Complaint and Jury Demand naming Koopman and the City as the sole Defendants [#127]. Plaintiff therein restates the identical factual allegations in ¶¶1-28 as appeared in Plaintiff's original Complaint, ¶¶1-8, 10, 14, 20-37, except that factual allegations against those parties no longer joined as Defendants have been eliminated. Plaintiff asserts a single claim for relief ("First Claim for Relief") based upon 42 U.S.C. §1983 and the Fourth and Fourteenth Amendments to the U.S. Constitution, claiming that Defendants maliciously prosecuted him. Generally speaking, this claim for relief stems from the September 6, 2007 execution of a no-knock search warrant at a premises in Loveland, Colorado, and the arrest of Plaintiff soon thereafter, as well as the subsequent criminal prosecution of Plaintiff for charges related to an alleged operation of a methamphetamine laboratory on those premises.

As discussed in more detail below, dismissal of the Plaintiff's claim for malicious prosecution is required for a variety of reasons. First, Plaintiff has failed to allege that the alleged malicious prosecution was conducted in accordance with the City's governmental policy or custom. This must be alleged and was not. The Defendant City must therefore be ordered dismissed as a party Defendant. Second, the sole claim for relief fails to state a claim for relief under the Fourteenth Amendment as a matter of law. Third, the sole claim for relief has not been sufficiently alleged under the clarified "plausible on its face" pleading standard set forth by the U.S. Supreme Court in *Bell*

Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed. 2d 929 (2007) and its progeny including *Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174 (10th Cir. 2007) and *Robbins v. Oklahoma*, 519 F.3d 1242 (10th Cir. 2008) due to Plaintiff's failure to allege with sufficient factual specificity the element of "malice." This must be alleged and was not. Finally, Koopman is entitled to share in the prosecutor's absolute prosecutorial immunity as to all alleged conduct intimately associated with the judicial phase of the criminal process against Plaintiff.

Accordingly, the Court would be acting properly in dismissing the case at this stage of the proceedings.

II. ARGUMENT

A. City Cannot be Held Liable Under a Municipal Liability Theory as Pled

Nowhere in the Amended Complaint has Plaintiff alleged that he was maliciously prosecuted pursuant to an official policy or custom of the City. A municipality is only liable under §1983 "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts which may fairly be said to represent official policy, inflicts the injury." *Nielander v. Board of County Commissioners*, 582 F.3d 1155, 1170 (10th Cir. 2009) (quoting *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)). "Proving a single incident of unconstitutional conduct is not enough." *Id.* "Rather, a plaintiff must show that the incident resulted from an existing unconstitutional policy attributable to a municipal policymaker." *Id.* (citing *Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24, 105 S.Ct. 2427, 85 L.Ed. 2d 791 (1985)).

The City cannot be held liable under a municipal liability theory as Plaintiff's Amended Complaint is pled. The Court should therefore order the City dismissed as a party Defendant.

B. Plaintiff's Claim for Malicious Prosecution Fails to State a Claim Under the Fourteenth Amendment

Plaintiff's claim for relief is legally flawed in that claims for malicious prosecution are not cognizable under the Fourteenth Amendment of the U.S. Constitution, which the Supreme Court has been careful to limit to substantive due process protections for marriage, family, procreation, and the right to bodily integrity. *Albright v. Oliver*, 510 U.S. 266, 273-275 (1994) (plurality). Only the Fourth Amendment addresses matters involving pretrial deprivations of liberty. *Id.* at 274, 275; *Pierce v.* Gilchrist, 359 F.3d 1279, 1287, n.5 (10th Cir. 2004) ("Because [plaintiff] was exonerated before trial, the [malicious prosecution] case involved only the Fourth, and not also the Fourteenth Amendment."); *Taylor v. Meacham*, 82 F.3d 1556, 1561, n.3 (10th Cir. 1996) ("a §1983 malicious prosecution claim does not implicate the Fourteenth Amendment's substantive due process standards."); *Wolford v. Lasater*, 78 F.3d 484, 489 (10th Cir. 1996) (claim of Fourteenth Amendment substantive due process violation by investigating, charging, arresting and indicting plaintiff on criminal charges "is simply not viable and was properly dismissed" after *Albright*); see *also Becker v. Kroll*, 494 F.3d 904, 919-921 (10th Cir. 2007) ("The more general due process considerations of the Fourteenth Amendment are not a fallback to protect interests more specifically addressed by the Fourth Amendment;" no §1983 claim will arise from filing criminal charges without probable cause under the substantive due process protections of the

Fourteenth Amendment). "[A] state actor's random and unauthorized deprivation of that interest [in freedom from malicious prosecution] cannot be challenged under 42 U.S.C. §1983 so long as the State provides an adequate postdeprivation remedy," *Albright*, 510 U.S. at 283-284 (Kennedy, J., concurring), which Colorado does provide, *see Hewitt v. Rice*, 154 P.3d 408, 411 (Colo. 2007); CJI-Civ. 17:1 (2010 ed.).

Plaintiff, in his Amended Complaint, invokes the Fourteenth Amendment in ¶5 and parenthetically in his First Claim for Relief immediately preceding ¶29. However, as outlined above, Plaintiff's claim for relief fails to state a claim for relief under the Fourteenth Amendment as a matter of law. Accordingly, that much of the claim for relief must be ordered dismissed and stricken.

C. <u>The Claim for Relief Fails to State a Plausible Claim for Malicious Prosecution Under the Fourth Amendment Under Applicable Plausibility Pleading Standard</u>

As recognized in this Court's Order Concerning Defendants' Motions to Dismiss [#99] filed September 27, 2010, when ruling on a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the Court must determine whether the allegations of the complaint are sufficient to state a claim within the meaning of Fed.R.Civ.P. 8(a). While the Court must accept all well-pleaded allegations of the Amended Complaint as true, *McDonald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 997 (10th Cir. 2002), "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss," Order Concerning Defendants' Motions to Dismiss [#99], and the Court must therefore review the Amended Complaint to determine whether it "contains 'enough facts to state a claim to relief that is plausible on its face.'" *Ridge at Red Hawk, LLC*,

493 F.3d at 1177 (quoting *Twombly*, 550 U.S. at 570)). "[T]he complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims." *Id.* (emphasis in original).

The Tenth Circuit has clarified the meaning of the *Twombly* "plausibility" standard:

> "[P]lausibility" in this context must refer to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs "have not nudged their claims across the line from conceivable to plausible." The allegations must be enough that, if assumed to be true, the plaintiff plausibly (not just speculatively) has a claim for relief.
>
> This requirement of plausibility serves not only to weed out claims that do not (in the absence of additional allegations) have a reasonable prospect of success, but also to inform the defendants of the actual grounds of the claim against them. "Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests."

Robbins, 519 F.3d at 1247-48 (quoting *Twombly*, 127 S.Ct. at 1974; internal citations and footnote omitted).

As further noted by the Court in its aforesaid Order Concerning Defendants' Motions to Dismiss [#99], the pleading standards stated in *Twombly* and its progeny are applicable to this claim brought under 42 U.S.C. §1983. *Robbins*, *supra*.

According to *Robbins*, under the *Twombly* test, the "burden is on the plaintiff to frame a 'complaint with enough factual matter (taken as true) to suggest' that he or she is entitled to relief." 519 F.3d at 1247. This Court, analyzing the same factual allegations set forth in the original Complaint as now appear in the Amended Complaint,

focused on allegations concerning the key element of malice[1], set forth in ¶64 of the original Complaint[2] [#1], and found them to be "general and conclusory." Order Concerning Defendants' Motions to Dismiss [#99] filed September 27, 2010 at 9.

The Court, after scouring all of the other allegations in the Complaint (which are essentially indistinguishable from the allegations in the Amended Complaint) found that "[n]one of the other allegations in the complaint provide more factual specificity on the key element of malice. Myers does not allege specific facts about who, what, where and when that establish a plausible claim that specific defendants who now seek dismissal of this claim *acted with malice.*" Order Concerning Defendants Motions to Dismiss [#99] at 9 (emphasis added).

"[T]he tenent that a court must accept as true all of the allegations contained in the complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqubal*, ___U.S.___, ___, 129 S.Ct. 1937, 1949 (2009). When "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.' Fed. Rule Civ. Proc. 8(a)(2)." *Id.* ___U.S. at ___, 129 S.Ct. at 1950.

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[1] The common law elements of malicious prosecution, having been adopted by the Tenth Circuit for malicious prosecution claims under §1983, *Novitsky v. City of Aurora,* 491 F.3d 1244, 1258 (10th Cir. 2007), are: (1) the defendant caused the plaintiff's continued confinement or prosecution; (2) the original action terminated in favor of the plaintiff; (3) there was no probable cause to support the original arrest, continued confinement, or prosecution; (4) the defendant acted with malice; and (5) the plaintiff sustained damages. "Malice" in this context means "a primary purpose other than that of bringing an offender to justice." Prosser and Keeton on The Law of Torts at 871 (5th ed.).

[2] Paragraph 64 of the original Complaint alleged: "Defendants recklessly, knowingly, intentionally, willfully, wantonly, and with deliberate indifference pursued a malicious prosecution against Mr. Myers, acting without knowledge that there was any substantial probability that Mr. Myers had committed any criminal activity."

"While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* "When there are well-pleaded factual allegations, a court should assume their veracity *and then determine whether they plausibly give rise to an entitlement to relief.*" *Id.* (emphasis added).

Apparently in order to address these pleading deficiencies previously found by the Court in the original Complaint, Plaintiff, in his Amended Complaint, essentially restates the earlier allegations set forth in ¶¶1-28 of the original Complaint in a summary fashion within the First Claim for Relief at ¶¶37-41. However, when analyzed under the applicable pleading standard, Plaintiff still fails to provide the necessary factual specificity on the "key element of malice." In other words, Plaintiff does not allege specific facts about who, what, where and when that establish a plausible claim that Koopman acted with malice.[3]

Paragraph 37.a. of the Amended Complaint alleges that for a three to four month period, the property which was the subject of the search was under video surveillance but that a review of the video shows nothing of what was alleged to be the facts as contained in the affidavit for a warrant. This allegation simply demonstrates that the affidavit was not based solely upon the surveillance video and fails to demonstrate facts constituting malice.

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[3] Without conceding the factual or legal validity, Defendants will assume, for the limited purpose of this motion, that Defendant Koopman caused the Plaintiff's continued confinement or prosecution and that the Plaintiff sustained damages. It is undisputed that the criminal prosecution terminated in favor of the Plaintiff upon its voluntary dismissal by the prosecutor. This Court has preliminarily observed that "there is substantial evidence to support the defendants' contention that there was probable cause to support Myers' arrest." Order Concerning Motion for Summary Judgment [#126] filed February 11, 2011.

Paragraph 37.b. alleges that at the time of the search a key to the premises was repeatedly offered to Koopman which offers were refused and that SWAT teams then broke into the buildings causing damage even though it is alleged that the surveillance video would have shown that Plaintiff had not been living on the premises for over a month. This allegation is only pertinent to the unreasonable search and seizure and excessive force claims, both of which have been dismissed with prejudice, and once again demonstrates that surveillance video was not the sole, exclusive or even primary basis for the search warrant affidavit and search. This also does not demonstrate malice, only the limitations of surveillance video.

Paragraph 37.c. which alleges that the jar containing a white substance was rusted and covered with dust, said to be a "clear indication that it hadn't been touched in years," is merely a conclusory statement and not a fact which in and of itself demonstrates malice. The allegation further asserts that the jar was retrieved from a building that did not belong to Plaintiff, his father or a company owned by Plaintiff's father that holds title to other buildings in the vicinity. It further alleges that Larimer County records would reflect ownership of the buildings. It fails to allege that Koopman knew this at the time of the arrest and prosecution, thereby again failing to provide specific facts supporting the key element of malice. The fact that the "white substance" turned out to be sugar found in an abandoned sugar lab is an allegation based on 20/20 hindsight, and not pertinent to Koopman's state of mind when Plaintiff was prosecuted.

The allegation in ¶37.d. that the building was locked and boarded and barred up, requiring Koopman and other officers to break into the building, is also deficient. There

is no logical or inherent connection between this alleged fact and the existence of malice in the prosecution of Plaintiff for suspected methamphetamine production.

Paragraph 37.e., asserting that the affidavit for the search warrant contained information about a meth lab being operated in the attic yet the attic access was quite small, contains alleged facts that do not constitute proof of malice. Moreover, Plaintiff concedes therein that the information in the affidavit for search warrant was from a confidential informant, thereby undermining Plaintiff's conclusory statement that Defendant Koopman acted with malice.

Paragraph 37.f. which discusses Plaintiff's inability to bond out when he turned himself in to the police, even if taken as true, does not speak to the issue of whether the actual *prosecution* of Plaintiff was undertaken with malice. Plaintiff's circumstance upon arrest and incarceration over the weekend is irrelevant to the question of whether malice existed in connection with the actual criminal *prosecution*. Moreover, such allegations do not demonstrate a purpose other than to bring a suspected criminal to justice.

Paragraph 37.g. asserts that Koopman was aware at Plaintiff's preliminary hearing that an environmental hygienist had been hired by Plaintiff to conduct chemical testing at the premises to determine the presence of meth. That paragraph further alleges that the hygienist found no meth present except for one small isolated location on furniture allegedly brought into the premises by another individual, and the hygienist reached the opinion that no meth was or ever had been manufactured on the premises. However, Plaintiff did not and cannot allege that Koopman knew the results of the

environmental hygienist's testing *before* Plaintiff was prosecuted. Similarly, the prosecution had already been undertaken by the time Koopman became aware of the negative CBI results at the preliminary hearing. Any necessary alleged malice, *arguendo*, had already been acted upon. Therefore, even if taken as true, this allegation does not constitute a sufficiently specific factual allegation of malice to withstand Rule 12(b)(6) scrutiny. All the allegation says – even when taken as true – is that CBI had, by the time of the preliminary hearing, tested the suspected substance as negative.

Plaintiff concedes in ¶37.h. that, "[a]t the time of the search Koopman and other LCDTF members conducted seven field tests of items and substances, all showing false positives." Plaintiff then argues inconsistently that "it is statistically impossible" for all seven field tests to have proved false given the frequent use and reliability of the test strips. This does not address malice. Plaintiff's further assertion that Defendant Koopman fabricated the results maliciously or the strips were intentionally and/or improperly used to achieve a malicious pre-determined goal is a conclusory statement and legal argument, not a specific who, what, where and when factual allegation.

Paragraph 37.i. contains conclusory statements that the video surveillance failed to show certain things referred to in Koopman's affidavit in support of the search warrant. All are conclusory statements. Conspicuously absent is a sufficiently detailed factual explanation of how the mere allegation that certain activities were not observable on limited surveillance video automatically and necessarily translates to a showing of malice when the search warrant affidavit, constituting the basis for the search warrant,

contained much more information beyond that secured by video surveillance. Similarly, the statement in ¶37.j. that Koopman maliciously and intentionally failed to reference the video surveillance in the affidavit for search warrant is a mere conclusory statement.

The remaining allegations of ¶37 in subparagraphs k. and l. – dealing with alleged activities of Koopman *after* the criminal prosecution was dismissed – cannot possibly constitute evidence of malice *precipitating* Plaintiff's criminal prosecution.

The allegations of ¶38 that Defendants caused Plaintiff continued confinement and prosecution notwithstanding the volume of evidence that began to accumulate from virtually the inception of the case that Plaintiff contends plainly showed Koopman to be wrong is nothing but a conclusory statement and legal argument.

In summary, all of the factual allegations set forth within the First Claim for Relief at best address the third element of a malicious prosecution claim under §1983, namely alleged lack of probable cause. None of them speak to the fourth element – that "the defendant acted with malice" – and the Amended Complaint therefore fails as a matter of law to comply with the *Twombly-Robbins* pleading standard with regard to the key element of malice. There is no allegation, for instance, that Detective Koopman is alleged to have been overheard telling someone that he intended to "get" Plaintiff and see to it that he was convicted with or without legitimate evidence, or that there was some "bad blood" or other history between Plaintiff and Koopman which would provide a motive for Koopman to act with "malice" toward Plaintiff, for example. Nothing is alleged, much less with sufficient factual specificity, to plausibly demonstrate that "*this* plaintiff has a reasonable likelihood of mustering factual support for" the "malice"

element of "*these* claims." *See Ridge at Red Hawk, LLC, supra.* "Malice may not be implied . . . ." *Koch v. Wright*, 67 Colo. 292, 296, 184 P. 363, 364 (1919). *See generally Novitsky v. City of Aurora*, 491 F.3d 1244, 1258 (10th Cir. 2007) (adopting the common law elements of malicious prosecution for malicious prosecution under §1983) (correlating "malice" with "intentional"); *Pierce*, 359 F.3d at 1287 (equating "malice" with "reckless disregard for the truth"); *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978) (employing a standard of "knowingly and intentionally, or with reckless disregard for the truth," falsifying or omitting evidence, in the context of Fourth Amendment challenges).

D. Koopman is Entitled to Absolute Immunity as to All Alleged Conduct Intimately Associated with the Judicial Phase of the Criminal Process Against Plaintiff

According to Justice Ginsburg in her concurring opinion in *Albright, supra*, "pursuing a malicious prosecution claim against a police officer is 'anomalous.'" 510 U.S. at 279 n.5 (quoted in *Taylor*, 82 F.3d at 1563 n.8). "The principal player in carrying out a prosecution – in 'the formal commencement of a criminal proceeding,' . . . – is not police officer but prosecutor. Prosecutors, however, have absolute immunity for their conduct . . . ." 82 F.3d at 1563 n.8. To the extent plaintiff's malicious prosecution claim focuses on Koopman's role in initiating and pursuing a criminal prosecution, this "raises serious questions about whether the police officer would be entitled to share the prosecutor's absolute immunity." *Id.*

Prosecutorial immunity is applicable to actions taken by a prosecutor when the actions in question are "'intimately associated with the judicial phase of the criminal process.'" *Van de Kamp v. Goldstein*, ___ U.S. ___, ___ 129 S.Ct. 855, 861-862

(2009). Therefore, Koopman is entitled to share the prosecutor's absolute immunity. *See Albright,* 510 U.S. at 279 n.5 (Ginsburg, J. concurring); *Briscoe v. LaHue*, 460 U.S. 325, 335-36, 103 S.Ct. 1108, 1116 (1983) (police officer appearing as testifying witness entitled to witness immunity and official immunity for "performing a critical role in the judicial process . . . .").

III. CONCLUSION

Plaintiff's Amended Complaint is legally flawed in a number of respects and must be dismissed. First, any claim alleged against the City must be dismissed as a matter of law on account of Plaintiff's failure to plead that his alleged malicious prosecution resulted from an existing unconstitutional policy or custom attributable to a municipal policymaker. Further, Plaintiff has no claim for malicious prosecution under the Fourteenth Amendment as a matter of law. Next, Plaintiff has essentially regurgitated the factual allegations of the original Complaint which the Court previously found deficient with respect to pleading factual specificity on the key element of malice to establish a malicious prosecution claim under §1983. The Amended Complaint is still deficient in this regard under the applicable pleading standard. Finally, Koopman is entitled to share in prosecutorial absolute immunity.

WHEREFORE, Defendants respectfully request the Court to dismiss the Amended Complaint in its entirety, award them their reasonable costs and attorneys' fees pursuant to 42 U.S.C. §1988, and for whatever further relief the Court deems just and proper.

DATED the 11th day of March, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on March 11th , 2011, I electronically filed the foregoing **DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT** 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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