IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANNABEL K. MELONGO, Plaintiff,	)	
	)	13 C 4924
vs.	)	
	)	Honorable Judge John Z. Lee
ASA ROBERT PODLASEK, et al., Defendants.	)	

MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

Defendants, Assistant State's Attorney Robert Podlasek, Assistant State's Attorney Julie Gunnigle, and Assistant State's Attorney Randy Roberts (incorrectly sued as Investigator Randy Roberts), Investigator Kate O'Hara, Investigator James Dillon, Investigator Antonio Rubino, Investigator Rich Lesiak, Cook County Sheriff Thomas Dart, and Cook County (collectively referred to as the "County Defendants") by their attorney, Anita Alvarez, State's Attorney of Cook County, through Thomas E. Nowinski, Assistant State's Attorney, hereby respectfully move to dismiss Plaintiff's Second Amended Complaint pursuant to Rules 12 (b)(1) and Rule 12 (b)(6) of the Federal Rules of Civil Procedure. In support thereof, Defendants state as follows:

INTRODUCTION

On November 5, 2014, Plaintiff filed a Second Amended Complaint against numerous Defendants which attempts to allege myriad causes of action in 4 substantive counts for various violations of the Constitution and state law. Plaintiff also attempts to allege that Cook County is liable under a *respondeat superior* theory of liability for the actions of the Sheriff Defendants. Finally, Plaintiff names Cook County Sheriff Thomas Dart as a Defendant but makes no allegations against the Sheriff's Office. Plaintiff cannot sustain his claims against the County Defendants because the Second Amended Complaint fails to state a cause of action upon which relief can be

granted, and the statute of limitations bars her claims, and various immunities bar her claims. As such, Plaintiff's Second Amended Complaint is deficient and should be dismissed.

STANDARD OF REVIEW

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) should be granted if the challenged pleading fails to state a claim upon which relief can be granted. *Corcoran v. Chicago Park District*, 875 F.2d 609, 611 (7th Cir. 1989). Such a motion tests the sufficiency of the complaint, not the merits of the suit. *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990). Thus, in order to survive a motion to dismiss pursuant to Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009)(*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (*citing Twombly*, 550 U.S. at 556). In its attempt to draw such an inference, the court will construe the complaint in a light favorable to the plaintiff and the court must accept all material facts alleged in the complaint as true. *Jackson v. E.J. Branch Corp*., 176 F.3d 971, 978 (7th Cir. 1999). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do." *Iqbal* 556 U.S. at 678. "Nor does a complaint suffice if it tenders 'naked assertion[s] devoid of further factual enhancement." *Id.*

Our Supreme Court in *Iqbal* has set forth a two prong inquiry when reviewing 12(b)(6) dismissals. First, pleadings consisting of conclusory allegations are not accepted as true when reviewing the complaint's sufficiency. This includes conclusory statements "couched" as factual allegations, and recitations of the elements. Second, after excising the conclusory allegations from the complaint, any well-pled factual allegations are accepted as true and then the Court

must determine whether the remaining well-pled facts "plausibly give rise to an entitlement of relief." *Id*. at 679.

In addition, "litigants may [also] plead themselves out of court by alleging facts that may establish defendants' entitlement to prevail," *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998), and a court is not required to ignore facts set forth in the complaint that undermine the plaintiff's claims. *Scott v. O'Grady*, 975 F. 2d 366, 368 (7th Cir. 1992).

Further, under 12(b)(1), a court must dismiss the case without ever reaching the merits if it concludes that it has no subject matter jurisdiction. *Capitol Leasing Co. v. F.D.I.C.*, 999 F.2d 188, 191 (7th Cir. 1993) *citing Shockley v. Jones*, 823 F.2d 1068, 1070 n.1 (7th Cir. 1987). This Court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether subject matter jurisdiction exists. *Capitol Leasing Co. v. F.D.I.C.*, 999 F.2d 188, 191 (7th Cir. 1993).

ARGUMENT

I. Plaintiff's Respondeat Superior Claim Against Cook County Fails

Count II of Plaintiff's Second Amended Complaint seeks to hold Cook County liable under a respondeat superior theory of liability for the actions of the Sheriff's Defendants. This claim fails as a matter of law. It is well settled in Illinois that a county's respondeat superior liability extends only to county employees and not to independent county officers. *Moy v. County of Cook*, 159 Ill.2d 519, 640 N.E.2d 926 (1994). Illinois sheriffs are independently elected officials not subject to the control of the county. *Thompson v. Duke*, 88 F.2d 1180, 1187 (7th Cir. 1989). Cook County has no authority to control the Sheriff of Cook County or his officers. *Acevedo v. Robinson*, 2000 U.S. Dist. LEXIS 1708 (N.D. Ill. February 16, 2000)

(Gettleman J). As such, Cook County cannot be held responsible for the actions of the Sheriff's Defendants.

II. Plaintiff's Second Amended Complaint Fails To State A Cause of Action Against The ASA Defendants, The Sheriff's Defendants, And The Sheriff

Count I of Plaintiff's Second Amended Complaint seeks relief for myriad violations of § 1983 allegedly by Assistant State's Attorney Robert Podlasek, Assistant State's Attorney Julie Gunnigle, and Assistant State's Attorney Randy Roberts (collectively referred to as the "ASA Defendants") and Investigator Kate O'Hara, Investigator James Dillon, Investigator Antonio Rubino, Investigator Rich Lesiak (collectively referred to as the "Sheriff Defendants"). However, Plaintiff merely recites a list of alleged "freedoms," including claims which are not recognized constitutional rights, under a bald assertion that her rights were deprived without delineating any basis for the alleged violations, elements of any such claims, or facts in support of those claims which would entitle her to relief. This pleading practice is exactly what our Supreme Court sought to preclude under *Iqbal* and *Twombly*. As such, Count I fails to state a cause of action against the ASA Defendants and the Sheriff Defendants and must be dismissed.

Similarly, Count IV of Plaintiff's Second Amended Complaint seeks relief for myriad state law violations allegedly by the ASA Defendants and the Sheriff Defendants. As in Count I, Plaintiff merely recites a list of alleged causes of action under a bald assertion that her rights were deprived again without delineating any basis for the alleged violations, elements of any such claims, or facts in support of those claims which would entitle her to relief. Again, this pleading practice is precluded under *Iqbal* and *Twombly*. As such, Count IV fails to state a cause of action against the ASA Defendants and the Sheriff Defendants and must be dismissed.

In addition, Plaintiff's Second Amended Complaint appears to seek liability as to the Cook County Sheriff Thomas Dart liable for her state law claims under a respondeat superior

theory. The sole indication of this claim is paragraph 106 of Plaintiff's Second Amended Complaint which merely states that the Sheriff is liable for the wrongful conduct of its deputies. Again, Plaintiff makes this bald assertion without delineating any basis for the alleged liability, elements of any such claims, or facts in support of those claims which would entitle her to relief. As this pleading practice is precluded under *Iqbal* and *Twombly*, Plaintiff's respondeat superior claim against the Sheriff must be dismissed.

III. Plaintiff's Claims in Counts I and IV Are Barred By The Statute Of Limitations

While it is entirely unclear what claims Plaintiff is advancing against the County Defendants in her Second Amended Complaint as explained in Section II above, it is clear that any claims under §1983 and Illinois tort law are barred by the statute of limitations. The time limit for bringing an action under § 1983 is governed by state law and is drawn from the limitation period provided by the forum state's personal injury statute. *Wilson v. Garcia*, 471 U.S. 261, 279 (1985). The statute of limitations for § 1983 actions in Illinois is two years. *Dixon v. Chrans*, 986 F.2d 201, 203 (7th Cir. 1993). Accordingly, Plaintiff was required to file her claim within two years of when that cause of action accrued. Civil rights claims accrue when the plaintiff knows or should know that his or her constitutional rights have been violated. *Wilson v. Giesen*, 956 F.2d 738, 740 (7th Cir. 1991).

According to Plaintiff's Second Amended Complaint, the alleged Constitutional violations "which give rise to this cause of action occurred within this jurisdiction and within two years of the filing of this Complaint." (Plaintiff's Second Amended Complaint, ¶27.) However, a review of Plaintiff's Second Amended Complaint indicates that these violations occurred when Plaintiff was criminally charged on October 31, 2006 and then again on April 13, 2010 on a second matter. Clearly any possible claim under §1983 against the County Defendants

accrued as early as October 31, 2006 and no later than April 13, 2010 when Plaintiff was criminally charged. Therefore, the statute of limitations on Plaintiff's claims ran as early as October 31, 2008 but no later than April 13, 2012. Plaintiff failed to file the instant action until July 10, 2013. Accordingly, her § 1983 claims against the County Defendants are barred by the statute of limitations and must be dismissed with prejudice.

Further, the Illinois Local Governmental and Governmental Employees Tort Immunity Act applicable to state law tort claims against governmental employees applies a one-year statute of limitations. 745 ILCS 10/8-101(a) As explained above, Plaintiff alleges no tortious conduct by any of the County Defendants after April 13, 2010 and must have filed her complaint by April 13, 2011. Accordingly, her state law tort claims against the County Defendants are barred by the statute of limitations and must be dismissed with prejudice.

IV. Plaintiff's Claims Against The ASA Defendants And The Sheriff's Defendants Are Barred By Various Immunities

A. Plaintiff's §1983 claims against the ASA Defendants are barred by absolute prosecutorial immunity.

It is well settled that prosecutors are absolutely immune from §1983 suits for damages relating to their initiation and presentation of the State's case. *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976). "[A]bsolute immunity shields prosecutors even if they act 'maliciously, unreasonably, without probable cause, or even on the basis of false testimony or evidence.'" *Smith v. Power*, 346 F.3d 740, 742 (7th Cir. 2003). Absolute immunity protects the ASA Defendants because, under Illinois law, the State's Attorney "is vested with the exclusive discretion in the initiation and management of a criminal prosecution." *Spiegel v. Rabinovitz*, 121 F.3d 251, 257 (7th Cir. 1997)

As the Supreme Court explained in *Imbler*, absolute immunity extends to all prosecutorial actions which are "intimately associated with the judicial phase of the criminal process." 424 U.S. at 430. The *Imbler* court recognized that "the duties of a prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution," and "decisions on a wide variety of sensitive issues" including "questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute . . ." *Id.* at 431 n.33. Furthermore, "[p]reparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence." *Id.* The court further found in *Imbler* that an out-of-court "effort to control the presentation of [a] witness' testimony" is entitled to absolute immunity and that absolute prosecutorial immunity extends to prosecutors' knowing use of false testimony and deliberate suppression of exculpatory evidence *Id.* at 430 n.32.

For purposes of absolute immunity, it is irrelevant whether the protected party acted negligently, with malice, or in bad faith. *Bradshaw v. DeGand*, 1992 U.S. Dist LEXIS 911, *4 (N.D. Ill. January 30, 1992) (Conlon, J.) (citing *Stump v. Sparkman*, 435 U.S. 349, 356 (1978) (absolute immunity for the judiciary precludes civil actions, even when a judge acts in bad faith)). When considering an immunity defense, a court should focus on the conduct for which immunity is claimed, not the harm that the conduct may have caused or the question of whether or not it was lawful. *Buckley v. Fitzsimmons*, 509 U.S. 259, 271 (1993). Immunity is immunity from suit, not merely a defense to liability. See, e.g, *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (discussing qualified immunity).

The Seventh Circuit recently analyzed a trial prosecutor's absolute immunity from suit. In *Fields v. Wharrie*, the court emphasized that "if in the course of a trial a prosecutor were to

urge one of his witnesses to lie, it would be arbitrary to describe this as an investigative act separate from prosecution; the prosecutor's conduct would have been 'intimately associated with the judicial phase of the criminal process,' and he would therefore be entitled to absolute immunity." *Fields v. Wharrie*, et al., 740 F.3d 1107, 1115 (7th Cir. 2014)

As delineated in Plaintiff's Second Amended Complaint, ASA Roberts criminally prosecuted Plaintiff for computer tampering and ASAs Podlasek and Gunnigle prosecuted Plaintiff for violating the Illinois Eavesdropping statute. All of the alleged actions by the ASA Defendants were intimately associated with the judicial phase of the criminal process and taken as part of their preparation for trial or during the trial on these charges. Accordingly, pursuant to *Imbler* and *Fields*, it is abundantly clear that the ASA Defendants are entitled to absolute immunity and the claims must be dismissed with prejudice.

B. Plaintiff's state law claims are barred by absolute prosecutorial immunity

As Plaintiff's state law claims against the ASA Defendants are necessarily based on the same factual allegations as Plaintiff's federal claims, the ASA Defendants are entitled to absolutely immune from Plaintiff's state claims as well. In discussing prosecutorial immunity, Illinois courts have mirrored the United States Supreme Court's pronouncement in *Imbler*. The Illinois Appellate Court reaffirmed the ongoing vitality of absolute prosecutorial immunity in the face of allegations of intentional misconduct by a State's Attorney in *White v. City of Chicago*, 369 Ill. App. 3d 765, 861 N.E.2d 1083 (1st Dist. 2006).

In *White*, the plaintiffs alleged that the State's Attorney's Office: (a) re-investigated the murder for which the plaintiffs were charged and determined they had no connection to the crime; (b) determined that another person had committed the murders; (c) determined that the main prosecution witness was untruthful; and (d) determined that the physical evidence did not

support the charges. *White*, 369 Ill. App. 3d at 768. The plaintiffs in *White* further alleged that the State's Attorney's Office conducted a second investigation that supported the findings of the original investigation. *Id.* Despite actual knowledge of these facts, alleged plaintiffs, the State's Attorney's Office (including the State's Attorney and one of his assistants) suppressed the information and induced a prosecution witness to testify falsely before the grand jury by paying him $4,000. *Id.* While recognizing the severity of the allegations against the State's Attorney's Office defendants, the *White* court found that they were protected from suit on the grounds of absolute prosecutorial immunity. *White*, 369 Ill. App. 3d at 775, 776, 777.

As such, Plaintiff's state law claims against the ASA Defendants are also barred by absolute immunity. Additionally, the allegation that the ASA Defendants acted as part of a conspiracy does not defeat the bar of absolute immunity under state law either. *White*, 369 Ill. App. 3d at 778 (noting that prosecutors are entitled to absolute immunity even when they are alleged to have been part of a conspiracy against a plaintiff).

C. Plaintiff's state law claims are barred by the Illinois Tort Immunity Act

Assuming *argumendo* that Plaintiff has sufficiently pled state law claims against the ASA Defendants and the Sheriff Defendants, Plaintiff's claims are still barred pursuant to the Illinois Tort Immunity Act. In Illinois, a public employee is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton conduct. 745 ILCS 10/2-202 (2014). Willful and wanton conduct as used in the Tort Immunity Act means a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property. 745 ILCS 10/1-210 (2014). Plaintiff fails to plead facts sufficient to show that any of the County Defendants acted with actual or deliberate intention to cause harm

or with utter indifference to Plaintiff's safety. Accordingly, any state law claims against the County Defendants are barred by the Tort Immunity Act.

V. The ASA Defendants and Sheriff Defendants Are Entitled To Qualified Immunity

A number of Plaintiff's allegations fail to state any violation of his constitutional rights and, therefore, ASA Lampkin is entitled to qualified immunity from these claims, as more fully discussed below. The Supreme Court has set forth a two-part inquiry to determine whether a government official is entitled to qualified immunity: (1) whether the facts alleged set forth a violation of a constitutional right and (2) whether the right was clearly established at the time of the defendant's alleged misconduct. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Akande v. Grounds*, 555 F.3d 586, 589-590 (7th Cir. 2009). Courts have discretion to decide which prong should be addressed first "in light of the circumstances in the particular case." *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009).

As discussed in Section II above, it is unclear what causes of action Plaintiff is advancing in her claims against the ASA Defendants and Sheriff Defendants. Plaintiff merely recites a list of alleged "freedoms," including claims which are not recognized constitutional rights, under a bald assertion that her rights were deprived without delineating any basis for the alleged violations, elements of any such claims, or facts in support of those claims which would entitle her to relief. Plaintiff's Second Amended Complaint fails to establish either the violation of a constitutional right or that the right was clearly established at the time of the alleged misconduct by the ASA Defendants and Sheriff Defendants. As such, the ASA Defendants and the Sheriff Defendants are entitled to qualified immunity.

VI. Plaintiff's Respondeat Superior Claim Against The Sheriff Must Be Dismissed

As discussed above, all of Plaintiff's claims against the Sheriff Defendants fail and must be dismissed. Accordingly, the claim of respondeat superior against Cook County Sheriff Thomas Dart must also be dismissed.

CONCLUSION

WHEREFORE**,** Assistant State's Attorney Robert Podlasek, Assistant State's Attorney Julie Gunnigle, Assistant State's Attorney Randy Roberts, Investigator Kate O'Hara, Investigator James Dillon, Investigator Antonio Rubino, Investigator Rich Lesiak, Cook County Sheriff Thomas Dart, and Cook County Cook County, move this Court to dismiss Plaintiff's Complaint with prejudice pursuant to Rules 12 (b)(1) and Rule 12 (b)(6) and decline to exercise supplemental jurisdiction over any remaining state law claims.

Respectfully submitted,

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