UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANNABEL K. MELONGO,	)
	)
Plaintiff,	)
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v.	)
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	)
ASA ROBERT PODLASEK; ASA JULIE GUNNINGL; INVESTIGATOR KATE O'HARA (Star No. 423); INVESTIGATOR JAMES DILLON (Star No. 1068); INVESTIGATOR ANTONIO RUBINO (Star No. 5043); INVESTIGATOR RICH LESIAK (Star No. 5000); UNKNOWN COOK COUNTY SHERIFF OFFICERS; DR. MATTHEW S. MARKOS; LAREUL LAUDIN; KYLE FRENCH; AMBER HAQQANI; LISA MADIGAN; COOK COUNTY; COOK COUNTY SHERIFF'S OFFICE.	)

PLAINTIFF'S RESPONSE TO COOK COUNTY DEFENDANTS' MOTION TO DISMISS

To state a claim upon which relief can be granted, the plaintiff's complaint need only contain "a short plain statement of the claim showing that [the plaintiff] is entitled to relief. Fed. R. Civ. P. 8(a)(2). The plaintiff is not required to make "detailed factual allegations." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Rather, the complaint must contain "only enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombley*, 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." *Iqbal*, 129 S. Ct. at 1949, *citing Twombley*, 550 U.S. at 556. When determining whether Plaintiff has met the standard, this Court must "tak[e] all well-pleaded allegations of the complaint as true and view [] them in the light most favorable to the plaintiff." *Santiago v. Walls*, 599 F. 3d 749, 756 (7th Cir. 2010), *quoting Zimmerman v. Tribble*, 226 F. 3d 568, 571 (7th Cir. 2000). The Seventh Circuit has interpreted the Supreme Court's *Iqbal* decision to mean that the plaintiff must merely "give enough details about the subject-matter of the case to present a story that holds together." *Swanson v. Citibank*, N.A., 614 F. 3d 400, 405 (7th Cir. 2010). The court asks itself, "could these things have happened, not did they happen." *Id*.

Plaintiff's complaint unquestionably satisfies this pleading standard.

I. Plaintiff Adequately Pled a *Monell* Claim Against Cook County in Count II of Plaintiff's Complaint.

Defendant Cook County moves to dismiss "Plaintiff's Respondeat Superior Claim" in Count II of Plaintiff's Complaint. However, Plaintiff did not allege that Cook County is liable for the actions of the County Defendants under a theory of Respondeat Superior. Rather, Plaintiff alleges that Cook County is "directly liable" under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), for Plaintiff's damages due to its custom and practice of condoning, acquiescing, and even promoting the unconstitutional conduct of its law enforcement officials to arrest and charge citizens under the now unconstitutional eavesdropping statute as retaliation for exercising their First Amendment rights. Pl. Comp. ¶¶95-96. Critically, Defendant Cook County makes no claim that Plaintiff has failed to adequately plead her *Monell* claim against the County.

Notably, Plaintiff specifically pled that City of Chicago Employees regularly recorded

conversations without consent of all parties and neither the Illinois Attorney General nor the Cook County State's Attorney's office investigated, arrested, or prosecuted these violators. Pl. Comp. ¶66. In contrast, the County promoted a practice among its law enforcement personnel to single out individuals, like Plaintiff, for prosecution under the eavesdropping statute when it sought to retaliate against individuals for exercising their First Amendment rights. Pl. Comp. ¶¶65-66; ¶¶94-98. Accordingly, the Defendants' motion to dismiss Count II of the Complaint because the County is not liable for the actions of the Sheriff Defendants under a theory of Respondeat Superior must be denied.

II. Plaintiff Sets Forth A Detailed Factual Narrative That Specifically Identifies the Actions of the Individual Defendants that Form the Basis of Her Claims

The Sheriff and ASA Defendants claim that Plaintiff merely listed a myriad of constitutional violations with no factual support. The Defendants overlook or ignore the 12 pages of factual allegations contained in Plaintiff's Complaint which Plaintiff "incorporat[ed], in their entirety" in support of Counts I and IV of her Complaint.

Specifically, ASAs Podlasek and Gunnigle, along with Sheriff Defendants Dillon, Lesiak, Rubino and O'Hara arrested Plaintiff for "threatening a public official" after Plaintiff exercised her First Amendment Right to create a website that chronicled the State's malicious prosecution of her for computer tampering. Pl. Comp. ¶¶58-62. After Plaintiff posted on her website that she had a "big surprise for the court in its attempt to push her out of the case by pretending that she is psychologically unbalanced. The surprise will be known on April 14, 2010," the Sheriff Defendants, at the direction of ASAs Podlasek and Gunnigle, arrested her for the offense of "threatening a public official," even though, no probable cause existed to support the arrest. Pl.

Comp. ¶¶57-62. As pled in Plaintiff's complaint, while Plaintiff was being examined by Defendant Markos at the Criminal Court Building for fitness to stand trial, the Sheriff Defendants interrupted Defendant Markos' examination of Plaintiff and directed Defendant Markos to question Plaintiff about her posts on her website. Pl. Comp. ¶¶59-60. Plaintiff explained to Defendant Markos that her statement merely referred to her intent to hire a new attorney on the next court date in her computer tampering charge. Pl. Comp. ¶58. Despite possessing this knowledge, the Sheriff Defendants at the direction of ASAs Podlasek and Gunnigle arrested Plaintiff for threatening a public official, even though Plaintiff's statement could not be reasonably construed as a threat; was not directed at a public official; and could not have placed any public official in apprehension of immediate future harm. 720 ILCS 5/12-9(a) (West 2010).

Police officers have "probable cause to arrest an individual when the facts and circumstances within their knowledge and of which they [have] reasonable trustworthy information are sufficient to warrant a prudent [person] in believing that the [suspect] had committed or was committing an offense." *Sheik-Abdi v. McClellan*, 37 F. 3d 1240, 1246 (7th Cir. 1994). "The existence of probable cause or arguable probable cause depends, in the first instance, on the elements of the predicate criminal offense(s) as defined by state law." *Abbott v. Sangamon Conty.,* 705 F. 3d 706, 715 (7th Cir. 2013). A person commits the offense of threatening a public official when that person knowingly and willfully delivers, directly or indirectly, to a public official a communication containing a threat that would place the public official or a member of his immediate family in reasonable apprehension of immediate or future bodily harm, sexual assault, confinement, or restraint. 720 ILCS 5/12-9(1)(1)(i). *See also People*

v. Hale, 2012 IL App (4th) 100949 at ¶20 (March 29, 2012). Critically, when the threat is conveyed to a sworn law enforcement officer, "the threat must contain *specific* facts indicative of a unique threat to the person, family, or property of the officer and not a generalized threat of harm." *Id.* at ¶23.

As pled in Plaintiff's Complaint, the Sheriff and ASA Defendants could point to no facts that justified the arrest of Plaintiff for threatening a public official, and therefore, the Sheriff Defendants' arrest of Plaintiff was lawless, unsupported by probable cause, and in violation of Plaintiff's Fourth Amendment right to be free from the constitutional guarantees outlined in Plaintiff's Complaint at Paragraph 92.

Notably, the Sheriff and ASA Defendants abandoned charges of "threatening a public official" and opted to charge Plaintiff for violating the eavesdropping statute – equally lawless under the Fourth Amendment. Relevant here, "[p]robable cause is lacking if an officer has knowledge of matter tending to establish that the arrestee is entitled . . . to a statutory exemption . . ." *Moore v. City of Chicago*, 2014 U.S. Dist. LEXIS 58402, *9 (N.D. Ill. 2014). *See also, Hodgkins ex rel. Hodgkins v. Peterson*, 355 F. 3d 1048, 1061 (7th Cir. 2004). At the time of Plaintiff's arrest, Illinois' eavesdropping statute prohibited a person from knowingly and intentionally using an eavesdropping device for the purpose of recording any part of any conversation unless that person did so with the consent of all the parties to the conversation[1]. However, exempt from criminal liability was the "recording of a conversation made by . . . a person, who is a party to the conversation, under reasonable suspicion that another party to the conversation is committing . . . a criminal offense . . . and there is reason to believe that evidence of the criminal offense may be obtained by the recording." [T]he exemption required (1) a

[1] The Illinois Eavesdropping Statute was subsequently struck down as unconstitutional. *People v. Melongo*, 2014 IL 114852 (Ill. 2014).

subjective suspicion that criminal activity is afoot, and (2) that the suspicion be objectively reasonable." *Carroll v. Lynch,* 698 F. 3d 561, 566 (7th Cir. 2012).

As pled in Plaintiff's Complaint, Plaintiff reasonably believed that the office of the Official Court Reporter had falsified an official report of proceedings that erroneously reflected her presence at an arraignment on a superceding indictment and bond hearing. Pl. Comp. ¶¶44-50. In an effort to document this crime, Plaintiff secretly recorded her phone conversations with Pamela Taylor, supervisor of the Official Court Reporter's office. Plaintiff's subjective belief that she was statutorily exempt from gaining Taylor's consent to record their conversations was patently obvious, since Plaintiff posted her conversations with Taylor on her website, expressly noting the statutory exemption. Plaintiff also proactively contacted the FBI to report her belief that the transcripts were falsified. Pl. Comp. ¶52-53.

Given these facts, known to the Sheriff and ASA Defendants at the time charges were levied against Plaintiff, *and as pled in Plaintiff's Complaint*, the Sheriff Defendants had no probable cause to arrest or charge Plaintiff for violating the eavesdropping statute. Pl. Comp.¶¶ 64-67. Accordingly, the Sheriff and ASA Defendants violated Plaintiff's Fourth Amendment guarantees as set out in paragraph 92 of Plaintiff's complaint.

Moreover, as pled in Plaintiff's complaint, the Sheriff and ASA Defendants arrested Plaintiff and instituted charges against her "purely out of vindictiveness and retaliation" for maintaining a website that purported to expose corruption in the Cook County Criminal justice system in violation of Plaintiff's First Amendment Rights. Pl. Comp. ¶¶ 66, 92(f & g).

To establish a *prima facie* case of a First Amendment retaliatory arrest, a plaintiff must that: (1) she "engaged in activity protected by the First Amendment;" (2) she "suffered a

deprivation that would likely deter First Amendment activity," and (3) "the First Amendment activity was at least a motivating factor in the police officer's decision." *Thayer v. Chiczewski*, 705 F. 3d 237, 251 (7th Cir. 2012). If a plaintiff can make out a *prima facie* case, "the burden shifts to the defendant to show that the harm would have occurred anyway." *Greene v. Doruff*, 660 F. 3d 975, 977 (7th Cir. 2011). If the defendant meets its burden of production, then "the burden shifts back to the plaintiff to demonstrate the proffered reason was pretextual and that the real reason was retaliatory animus." *Thayer*, 705 F. 3d at 252.

Plaintiff's complaint lays out a detailed narrative, explaining her basis for believing that the Sheriff and ASA Defendants retaliated against her for exercising her First Amendment rights.

In addition to adequately pleading her federal claims, Plaintiff provided a sufficient factual basis to support her state tort claims set forth in Count IV of the Complaint, false arrest (Pl. Comp. ¶¶62-67), false imprisonment (Pl. Comp. ¶¶62-67), malicious prosecution (Pl. Comp. ¶¶62-67), conspiracy (Pl. Comp. ¶¶56-86), slander (Pl. Comp. ¶¶56-86), fraud (Pl. Comp. ¶¶56-86), intentional infliction of emotion distress ((Pl. Comp. ¶¶56-86), and negligent infliction of emotion distress (Pl. Comp. ¶¶56-86).

Defendants generally state that Plaintiff has failed to satisfy her pleading requirement with respect to the state law tort claims, but fails to specifically identify which state tort claims they object to There is no question that consistent with the holding of *Swanson v. Citibank*, N.A., 614 F. 3d 400, 405 (7th Cir. 2010). Plaintiff has "give[n[enough details about the subject-matter of the case to present a story that holds together."

III. Plaintiff's Claims Are Not Barred by the Statute of Limitations

Defendants argue that Plaintiff's claims are barred by the statute of limitations. At the

outset, it is unusual to dismiss a claim as time-barred under Rule 12(b)(6) because the statute of limitations is an affirmative defense that a complaint need not anticipate or overcome. *Hollander v. Brown*, 457 F. 3d 688, 691 n.1 (7th Cir. 2006). Notwithstanding the above, Plaintiff's claims were timely filed. Plaintiff filed this Amended Complaint on June 5, 2014. The County Defendants were served with a summons and copy of the amended complaint on June 24, 2014. Claims related to Plaintiff's prosecution under the Illinois eavesdropping statute did not accrue until July 26, 2012 when the charges were officially dismissed. Claims related to the computer tampering charge did not accrue until July 28, 2014 when the State dismissed two counts of the indictment and Cook County Judge Joyce granted Plaintiff's motion for a directed finding on the final count of the indictment. Because Plaintiff filed her complaint and served all defendants within two years of the accrual of *both* charges, Defendants' motion to dismiss on statute of limitations grounds must be dismissed.

Even Plaintiff's false arrest and false imprisonment claims related to her arrest for violating the Illinois eavesdropping statute are not subject to dismissal on statute of limitations grounds. Although Plaintiff's original complaint, alleging false arrest and false imprisonment, was filed more than two years after she was arraigned on the eavesdropping charges, the doctrine of equitable tolling precludes the Court from dismissing Plaintiff's false arrest and imprisonment charges. Under Illinois law, equitable tolling may be invoked to suspend the running of the statute of limitations when (1) a defendant has actively misled the plaintiff; and (2) extraordinary circumstances have prevented the plaintiff from asserting her rights; or (3) the plaintiff timely but mistakenly asserted her rights in the wrong forum *Clay v. Kuhl*, 727 N.E.2d 217, 223 (Ill. Sup. Ct. 2000)

Plaintiff has alleged while she was in custody on the eavesdropping charges and representing herself *pro se*, she was ordered to tender her entire file to Defendant Podlasek which remained in his possession for over four months. (Pl. Comp. ¶¶77-78) Plaintiff has also alleged that Defendant Podlasek removed vital documents from her file. Defendant Podlasek's egregious conduct and the extraordinary circumstances justify invocation of the equitable tolling doctrine and dismissal on statute of limitations grounds at this juncture is inappropriate.

IV. Defendants' Motion for Dismissal Should Not Be Granted on Immunity Grounds.

At the outset, a complaint is generally not dismissed under Rule 12(b)(6) on immunity grounds. Like the statute of limitations, immunity is an affirmative defense, which Plaintiff ordinarily need not anticipate in her complaint. *Cooney v.* Casady, 652 F. Supp. 2d 948, 956 (N.D. Ill 2009). Because an "immunity defense usually depends on the facts of the case, dismissal at the pleading stage is inappropriate." *Hortsman v. County of DuPage*, 284 F. Supp. 2d 1125, 1133 (N.D. Ill 2003), *quoting Alvarado v. Litscher*, 67 F. 3d 648, 651-52 (7th Cir. 2001)

A. *Absolute Immunity*

The ASA Defendants are not entitled to absolute immunity. The ASA Defendants status As prosecutors alone do not afford them blanket protection from suit by way of absolute immunity. "prosecutor are absolutely immune from suits for monetary damages under § 1983 for conduct that 'intimately associated with the judicial phase of the criminal process." *Smith v. Power*, 346 F. 3d 740, 742 (7th Cir. 2003), *quoting Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). "A prosecutor is shielded by absolute immunity when he acts 'as an advocate for the State' but not when his acts are investigative and unrelated to the preparation and initiation of

judicial proceedings." *Id*., *citing Buckley v. Fitzsimmons*, 509 U.S. 259, 272 (1993). Thus, absolute immunity is only for acts they commit within the scope of their employment as prosecutors. *Fields v. Wharrie* (*Fields II*), 740 F. 3d 1107, 1110-1111 (7th Cir. 2014), *citing Buckley*, 509 U.S. at 273-276. Often their employment duties go beyond the strictly prosecutorial to include investigation, and when they do non-prosecutorial work they lose their absolute immunity and have only the immunity, called "qualified," that other investigators enjoy when engaged in such work. *Id*. Thus, the level of immunity to which the ASA Defendants are entitled turns on the function that they were performing at the time of the alleged misconduct. *See Binachi v. McQueen*, No. 12-cv-00364, 2014 WL 700628 at *7 (N.D. Ill. Feb. 24, 2014)

Plaintiff's Complaint clearly sets forth facts that show that the ASA Defendants were functioning as investigators when Carol Spizzirri first contacted her "friend" Dick Devine and asked him to direct an investigation into Plaintiff's alleged destruction of SALF computer files, and later, when the ASA Defendants were monitoring Plaintiff's website and issuing investigatory subpoenas for records related to Plaintiff's website, a website aimed at exposing corruption in the Cook County Criminal justice system.. Plaintiff alleges that ASA Roberts investigated and directed the investigation of Carol Spizzirri's claims of computer tampering against Plaintiff at the direction of the former Cook County State's Attorney Dick Devine. (Pl. Comp. ¶¶39-40) Further, Plaintiff alleges that while she was undergoing a psychological exam to determine her fitness to stand trial on the computer tampering charges, ASA Defendants Podlasek and Gunnigle directed Defendant Dillon to arrest Plaintiff for posting a message on her website that they construed as "threatening". (Pl. Comp. ¶58) Plaintiff alleges that ASAs Podalsek and Gunnigle were investigating Plaintiff's actions as it related to her website, were

monitoring her website, and even issued investigatory subpoenas to obtain records related to Plaintiff's website. (Pl. Comp. ¶¶ 62) Plaintiff also alleged that Defendant ASA Podlasek stole documents from her files when she was ordered to produce her files to the Podlasek during a period of time in which she represented herself *pro se*. (Pl. Comp. ¶¶77-78)

These facts demonstrate that the ASA Defendants were functioning in an investigatory role and the affirmative defense of absolute immunity is unavailable to them.

B. *Illinois Tort Immunity Act*

The Sheriff and ASA Defendants contend that Plaintiff is barred from bring state law tort claims against them pursuant to the Illinois Tort Immunity Act. Contrary to Defendants' argument, Plaintiff has alleged that Defendants actions were "unlawful, conscience shocking, unconstitutional, and performed maliciously, recklessly. fraudulently, intentionally, willfully, and wantonly." (Pl. Comp. ¶110) Accordingly, Defendants may not invoke the Illinois Tort Immunity Act as an affirmative defense and dismissal on this basis would be inappropriate.

C. *Qualified Immunity*

Defendants' assertion of qualified immunity in premature. A complaint is generally not dismissed under Rule 12(b)(6) on qualified immunity grounds. *Jacobs v. City of Chicago*, 215 F. 3d 758, 765 n.3 (7th Cir. 2000). "The plaintiff is not required initially to plead factual allegations that anticipate and overcome a defense of qualified immunity and almost always a bad ground for dismissal . . . and when defendants do assert immunity, it is essential to consider facts in addition to those in the complaint." *Id*. at 775. Accordingly, dismissal on qualified immunity grounds is inappropriate.

For the foregoing reasons, the County Defendants' Motion to Dismiss pursuant to Fed. R.

12(b)(6) should be denied in its entirety.

Respectfully Submitted,

/S/JENNIFER BONJEAN

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