

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANNABEL K. MELONGO,

Plaintiff,

v.

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; KYLE FRENCH; COOK COUNTY;
COOK COUNTY SHERIFF THOMAS DART;
ASA RANDY ROBERTS; SCHILLER PARK;
DET. WILLIAM MARTIN; VILLAGE OF
SCHILLER PARK; CAROL SPRIZZIRRI

13-cv-04924

Defendants.

PLAINTIFF’S RESPONSE TO DEFENDANT FRENCH’S 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. 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.” *Iqbal*, 129 S. Ct. at 1949, *citing Twombly*, 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. Defendant French does not argue otherwise. Rather, French raises four affirmative defenses in support of his motion to dismiss, namely a prosecutorial immunity defense, a statute of limitations defense, a qualified immunity defense, and an Eleventh Amendment Immunity defense. For the reasons that follow, Defendant French’s motion to dismiss must be denied on all grounds.

I. Defendant French Is Not Entitled to Absolute Immunity Where He Played an Active Role In Investigating Plaintiff’s Criminal Charges for Computer Tampering and Eavesdropping.

Defendant French’s status as a prosecutor alone does not afford him blanket protection from suit by way of absolute immunity. “prosecutors are absolutely immune from suits for monetary damages under § 1983 for conduct that is ‘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 Defendant French is entitled turns on the function that he was 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 Defendant French was functioning as an investigator when Carol Spizzirri first contacted the Cook County State's Attorney's office, requesting that Dick Devine investigate her allegation that Plaintiff destroyed SALF computer files. Plaintiff alleges that Defendant French 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) Plaintiff further alleges that Defendant French monitored and investigated Plaintiff's website, a website aimed at exposing corruption in the Cook County Criminal justice system. Indeed, as set out in Plaintiff's complaint, in January, 2010, Defendant French began investigating Plaintiff's website and instructed a computer evidence recovery technician to capture the website for investigative purposes. (Pl. Comp. ¶54) Plaintiff further pled that Defendant French, along with Defendants

Gunnigle and Podlasek, conspired to have her arrested on false charges, related to their investigation of Plaintiff's website, including issuing investigatory subpoenas to obtain records related to Plaintiff's website. (Pl. Comp. ¶¶ 62)

The foregoing facts demonstrate that the Defendant French was functioning in an investigatory role and the affirmative defense of absolute immunity is unavailable to him. Certainly, dismissal at this juncture is grossly premature. Alternatively, if this Court concludes that Plaintiff's complaint does not set out sufficient facts to establish that Defendant French is not entitled to absolute immunity, Plaintiff respectfully requests that this Court grant her an opportunity to amend her complaint to include more detailed facts.

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

Defendant French argues that Plaintiff's claims are barred by the statute of limitations. As stated above, 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 her original complaint, pertaining to the eavesdropping charges and naming Kyle French as a Defendant on July 10, 2013, less than a year after those charges accrued. Plaintiff's complaint was timely filed. However, this Court ordered that no summonses should issue until Plaintiff's counsel filed an amended Complaint. Two court-appointed counsel failed to file an Amended Complaint, but Plaintiff's current Counsel who entered an appearance in this case on April 4, 2014 filed an Amended Complaint on June 5, 2014. Upon disposition of Plaintiff's computer tampering charges, Plaintiff filed a Second Amended Complaint on November 5, 2014.

Defendant French was served with a summons and copy of the Complaint on January 17, 2015. 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. Moreover, Plaintiff's Amended Complaint relates back to her original timely filed complaint. Because Plaintiff's claims were filed within two years of the accrual of both the eavesdropping and computer tampering charges, Defendants' motion to dismiss on statute of limitations grounds must be dismissed.

However, even if Plaintiff's claims of false arrest, false imprisonment, and malicious prosecution related to her arrest for violating the Illinois eavesdropping statute were not timely filed, the doctrine of equitable tolling precludes the Court from dismissing those claims. 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's complaint sets forth an extraordinary set of circumstances that justify invocation of the equitable tolling doctrine. Plaintiff was wrongfully imprisoned for 20 months under the eavesdropping statute. Further, while Plaintiff 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.

This Court has previously observed that where a defendant invokes an affirmative defense, “[a] complaint states a claim on which relief may be granted whether or not some defense is potentially available. This is why complaints need not anticipate and attempt to plead around defenses. *U.S. v. N. Trust Co.*, 372 F. 3d 886, 888 (7th Cir. 2004). Accordingly, it is not necessary for Plaintiff to have pleaded that Defendants actively misled him in some extraordinary way or prevented him from asserting his rights. *Id.* Only if a Plaintiff pleads himself out of court by alleging facts that establish the defense can a motion to dismiss dispose of a complaint on statute of limitations grounds. Otherwise, resolving this defense comes after the pleadings stage. *Id.*

Although Plaintiff maintains that the claims filed against Defendant French were timely filed, even if they were not, dismissal on statute of limitations grounds at this juncture is not appropriate since Plaintiff has invoked the doctrine of equitable tolling to justify the untimely filing.

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

Defendant's assertion of qualified immunity is 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.

IV. Dismissal on Absolute Immunity Grounds is Inappropriate since Defendant French Named Individually.

For the foregoing reasons, Defendant French's Motion to Dismiss pursuant to Fed. R. 12(b)(6) should be denied in its entirety. Should this Court determine that Plaintiff's complaint fails to allege sufficient facts to overcome Defendant French's affirmative defenses, Plaintiff respectfully requests that this Court grant her the opportunity to amend her complaint.

Respectfully Submitted,

/S/JENNIFER BONJEAN

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