

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

EDITH UNDERWOOD : CIVIL ACTION
v. :
COMMONWEALTH OF : NO. 05-3452
PENNSYLVANIA, et al.

MEMORANDUM

Baylson, J.

April 26, 2006

Plaintiff Edith Underwood (“Plaintiff” or “Underwood”) brings this suit against the Commonwealth of Pennsylvania (“Commonwealth”), the Pennsylvania State Police (“State Police”), and Pennsylvania State Police Trooper John Nelson (“Nelson”) (collectively “Defendants”) alleging violations of the Fourth and Fourteenth Amendments and state law claims, including malicious prosecution and intentional infliction of emotional distress, against all Defendants (Count I) as well as a Monell claim against the Commonwealth and the State Police (Count II). The Court has jurisdiction pursuant to 28 U.S.C. § 1331, as the case involves causes of action arising under federal law. The Court also has supplemental jurisdiction of all state claims, and venue is appropriate under 28 U.S.C. § 1391.

Presently before the Court is a Motion to Dismiss pursuant to F.R. Civ. P. 12(b)(6) filed by Defendants on November 4, 2005 (Doc. No. 3). Plaintiff responded to this Motion on December 9, 2005 (Doc. No. 8).

I. Background

Plaintiff alleges that a crime occurred on June 3, 1999 when two females entered a Kohl's department store in suburban Philadelphia, and one of them fraudulently applied for a credit card under the name of another person. The store's surveillance cameras captured images of the women while they were in the store and as they departed and entered the parking lot. The two females then used keys to enter a car in the lot and drove away. State Police Trooper Nelson was assigned to investigate the matter and, using photographic stills from the store surveillance footage, was able to determine the car's license plate number. Compl. at ¶¶ 16–17.

After discovering that the car was registered to a Robert Underwood, Nelson subsequently located Mr. Underwood and questioned him concerning the women seen in the surveillance video. Mr. Underwood indicated that he could not identify the women in the photographs but Nelson subsequently learned that Mr. Underwood had allowed both his mother and brother to use the car in question and that they could have lent it to others. Nelson also discovered that Mr. Underwood's mother was named Edith Underwood, and he obtained copies of her driver's license photographs. *Id.* at ¶ 22.

After comparing Edith Underwood's driver's license photographs with the stills from the surveillance video, Nelson signed an affidavit of probable cause stating that Underwood was one of the women seen in the surveillance video filling out the credit card application. Based on this affidavit, a magistrate issued a warrant on February 2, 2000 for the arrest of Underwood, and she was arrested on July 3, 2003. Underwood was charged with forgery, access device fraud, and securing execution of documents by deception, and she was imprisoned and prosecuted by the Delaware County District Attorney's office. On March 4, 2004, all charges were dropped and the

District Attorney's office acknowledged her innocence. Id. at ¶ 31.

As the Plaintiff in this civil suit, Underwood alleges that Nelson, in making the affidavit of probable cause, either knew that she was not depicted in the video surveillance footage or stated in reckless disregard of the truth that she was so depicted. Id. at ¶ 25.

II. Parties' Contentions

Defendants argue that the Eleventh Amendment bars the federal claims against the Commonwealth and the State Police as well as the federal claims for damages against Nelson in his official capacity. In the alternative, Defendants also contend that the Will doctrine similarly bars all federal claims against the Commonwealth, the State Police, and the federal claims for damages against Nelson in his official capacity. In her response, Plaintiff admits that both theories function to bar the federal claims against the Commonwealth and the State Police and the federal claims for damages against Nelson in his official capacity. Pl's Resp. at 5 n.1.

Defendants also assert that sovereign immunity bars all state claims for damages in this case, and Plaintiff in her response also admits the accuracy of this statement. Id. Based on these admissions by Plaintiff, the Court will therefore dismiss: (1) the state law claims in Count I against all Defendants; (2) the federal claims in Count I against the Commonwealth, the State Police, and Nelson in his official capacity; and (3) Count II in its entirety.

The remaining issue before the Court is the § 1983 claim against Nelson in his individual capacity, alleging a violation of Plaintiff's rights under the Fourth Amendment. Defendants argue that all of the claims arising from the Fourth Amendment violation depend upon the existence of probable cause. They contend that probable cause is based upon a totality of the circumstances and that the standard is significantly lower than that required for a criminal

conviction. Defs' Br. at 11. Defendants also note that negligence in preparing an affidavit of probable cause is insufficient to establish liability.

Though Plaintiff claims that Nelson asserted facts with reckless disregard for the truth, Defendants contend that misstatements and/or omissions made with reckless disregard are not material if the warrant in question establishes probable cause even without them. Moreover, a warrant should be "corrected" by inserting omissions and removing the offending statements and should then be analyzed to make a probable cause determination. Id. Defendants assert that the only issue at hand concerning probable cause is the identification made by Nelson, which, of course, turns on the resemblance of the individuals in the photographs. Defendants maintain that even if the statement from the affidavit was changed from a clear assertion that the woman in the surveillance footage "is" Underwood to an indication that the woman "resembled" Underwood, probable cause would have been established in light of the totality of the circumstances.

In addition to their argument based on probable cause, Defendants also argue that the doctrine of qualified immunity should shield Nelson from liability for the remaining claims. Defendants contend that Nelson should be immune from damage claims in this case because a reasonable person in his position could have believed that his actions were proper in light of clearly established law. Id. at 14. Even considering Plaintiff's allegations of reckless disregard for the truth in the affidavit for probable cause, Defendants argue that the qualified immunity defense still applies as long as Nelson's actions were objectively reasonable. Moreover, Defendants assert that the qualified immunity defense does not mirror the probable cause standard and that immunity can be applied even when evidence might be insufficient to support probable cause. Id. at 15.

In her response, Plaintiff argues that Nelson either knowingly or with reckless disregard for the truth made false statements in the affidavit of probable cause and that the false statements constituted an affirmative misrepresentation and/or material omission. Specifically, Plaintiff asserts that Nelson lacked sufficient foundation to state that the woman in the surveillance video was her or even resembled her. Plaintiff contends that her age and height (which were both listed on her driver's license) as well as specific facial features clearly distinguish her from the woman in the surveillance footage. Plaintiff argues that she is "plainly" not the person in the surveillance footage. Moreover, Plaintiff also notes that she has not yet determined whether Nelson placed her picture in a photo array and showed the array to eyewitnesses from the Kohl's store. Plaintiff notes that if an array was used, any responses from eyewitnesses would be useful in determining whether there was probable cause in this case and that discovery would aid in clarifying the procedures used and steps taken by Nelson during his investigation.

As for the Defendants' alternative basis for dismissal, Plaintiff notes that though qualified immunity issues should generally be resolved at the earliest possible stages of litigation, a decision on the matter is premature when there are unresolved disputes of historical fact relevant to the immunity analysis. Pl's Resp. at 7. Plaintiff contends that she has adequately alleged that she was seized without probable cause, a clear violation of the Fourth Amendment, and that a reasonable official would understand that submission of an affidavit of probable cause for arrest which contained material misstatements as to the identity of a person in a surveillance video would violate the arrested person's clearly established right. Therefore, Plaintiff argues that the invocation of the qualified immunity defense is premature at this point in the case and that Defendants' Motion to Dismiss should be denied as to the federal claims for damages against

Nelson in his personal capacity.

III. Legal Standard

When deciding a motion to dismiss pursuant to F.R. Civ. P. 12(b)(6), the Court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1251, 1261 (3d Cir. 1994). The Court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the plaintiff.

Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted only when it is certain that no relief could be granted under any set of facts that could be proved by the plaintiff. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

IV. Discussion

The Plaintiff's Complaint takes full advantage of the liberal pleading standards of the Federal Rules of Civil Procedure.¹ In Count I, Plaintiff alleges a substantive due process claim under the Fourteenth Amendment as well as a malicious prosecution claim under the Fourth

¹ The Complaint does not specifically distinguish the state and federal claims in Count I. Instead, under an introduction noting Plaintiff's rights under the United States Constitution *and* state law, Plaintiff lists various "deprivations" of her freedoms resulting from Defendants' actions. Without further explanation, it is difficult to precisely determine the claims set forth, but the Court has read ¶ 34 of the Complaint to include two state law claims (malicious prosecution and intentional infliction of emotional distress) and two federal claims (malicious prosecution under the Fourth Amendment and a substantive due process claim under the Fourteenth Amendment).

As for Plaintiff's assertion that she was deprived of "freedom from summary punishment," Complaint at ¶ 34, the Court is unable to determine the basis for any such claim. A right to be free from summary punishment has been interpreted as a Fourth Amendment excessive force claim in a case where the bases for multiple constitutional claims was not entirely clear. See Autrey v. City of Lancaster, 2003 U.S. Dist. LEXIS 7694, at **19–21 (E.D. Pa. Apr. 17, 2003). Here, however, Plaintiff has not detailed any behavior by the Defendants which would serve as the basis for an excessive force claim. A thorough review of the Complaint indicates that the allegations all relate to Plaintiff's arrest without probable cause, and the Court will therefore treat the allegation that Plaintiff was deprived of her "freedom from summary punishment" as subsumed by the malicious prosecution claim under the Fourth Amendment.

Amendment. Although Plaintiff also claims that Defendants' actions violated his right to due process granted by the Fourteenth Amendment, the Court holds that this claim must be dismissed because it is more precisely characterized as a Fourth Amendment malicious prosecution claim.

In a series of cases, the Supreme Court articulated the "Most Precise Claim Doctrine," wherein "if a constitutional claim is covered by a specific constitutional provision, it must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." County of Sacramento v. Lewis, 523 U.S. 833, 843 (1998). The Third Circuit has also indicated reluctance to use substantive due process theory when other constitutional claims are extant. See generally, Khodara Envtl., Inc. ex rel. Eagle Envtl., L.P. v. Beckman, 237 F.3d 186, 197–98 (3d Cir. 2001). Accordingly, because it is more precisely characterized as a Fourth Amendment malicious prosecution claim, Plaintiff's Fourteenth Amendment Due Process claim must be dismissed.

The Court will now turn to the remaining federal claim, the Fourth Amendment malicious prosecution claim brought against Nelson in his individual capacity. In order to prevail in a § 1983 malicious prosecution claim, a plaintiff must show: (1) the defendants initiated a criminal proceeding; (2) the criminal proceeding ended in the plaintiff's favor; (3) the proceeding was initiated without probable cause; (4) the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice; and (5) the plaintiff suffered a deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding. DiBella v. Borough of Beachwood, 407 F.3d 599, 601 (3d Cir. 2005) (citing Estate of Smith v. Marasco, 318 F.3d 497, 521 (3d Cir. 2003)). "A police officer may be considered to have initiated a criminal proceeding if he or she provided false information which was used to initiate the criminal proceeding."

Hayes v. City of Philadelphia, 2005 WL 3054550, at *4 (E.D. Pa. Nov. 15, 2005) (citing Brockington v. City of Philadelphia, 354 F. Supp. 2d 563, 569 (E.D. Pa. 2005)).

Here, Plaintiff was arrested, charged, and imprisoned for the crimes committed at the Kohl's store on June 3, 1999. The Complaint clearly sets forth a constitutional violation, alleging a loss of liberty under the Fourth Amendment, and the Court therefore finds that Plaintiff alleges she suffered seizure as a consequence of a legal proceeding. See DiBella, 407 F.3d at 601; see also Brockington, 354 F. Supp. 2d at 568–69 (holding that “[a]lthough ‘prosecution without probable cause is not, in and of itself, a constitutional tort,’ it can be a constitutional tort if plaintiff can demonstrate a ‘deprivation of liberty consistent with the concept of seizure’” (quoting Gallo v. Philadelphia, 161 F.3d 217, 222 (3d Cir. 1998))). Defendants have presented two alternative lines of argument for dismissal of the malicious prosecution claim, each of which will be discussed by the Court in turn.

A. Probable Cause

The first question before the Court is whether there was probable cause for arrest of the Plaintiff for the offenses of forgery, access device fraud, and securing execution of documents by deception. Though Plaintiff does not specifically admit that the women in the store committed the acts of which they are accused or that they were photographed doing so by the store video cameras, see Pl's Resp. at 4, she does not focus her probable cause arguments on the elements of the various offenses charged. Instead, the key issue, and the one which receives the bulk of the attention in the briefs, is the identity of the woman in the video and whether there was probable cause to arrest Plaintiff for the crimes.

“Probable cause to arrest exists when the facts and circumstances within the arresting

officer's knowledge are sufficient in themselves to warrant a reasonable person to believe that the offense has been or is being committed by the person to be arrested." Wilson v. Russo, 212 F.3d 781, 789 (3d Cir. 2000) (citing Orsatti v. N.J. State Police, 71 F.3d 480 783 (3d Cir. 1995)). "A police officer may be liable for civil damages for an arrest if 'no reasonable competent officer' would conclude that probable cause exists." Id. at 789–90 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

Defendants argue that in light of the totality of the circumstances probable cause was established through a resemblance between Plaintiff and the women seen in the surveillance footage. Plaintiff contends that several factors indicate that there is no such resemblance and therefore that there was no probable cause as to the identification of the Plaintiff in Nelson's affidavit. She asserts that both the age and height information listed on her license as well as specific physical features clearly indicated that she was not the woman depicted in the surveillance footage from the store.

Although Defendants argue that the claim should be dismissed since they have shown that there was probable cause for the arrest of Plaintiff, the Court cannot consider matters outside the pleadings at the 12(b)(6) stage without converting the motion to dismiss into a motion for summary judgment. Accordingly, the Court will only consider Plaintiff's Complaint at this time.² In her Complaint, Plaintiff alleges that Nelson instituted proceedings against her without

² Many of the arguments presented by Defendants in their brief regarding probable cause involve factual issues concerning the photographic comparisons made by Nelson during his investigation. While the Court appreciates the significance of these matters, whether there are facts to support Plaintiff's allegation that Nelson was knowingly misleading or recklessly disregarded the truth in creating the affidavit of probable cause is a challenge more appropriate for summary judgment, not a motion to dismiss.

probable cause, either intentionally or with reckless disregard for the truth, that she was arrested and imprisoned, and that the proceedings terminated in Plaintiff's favor. Pl's Compl. at ¶¶ 25, 29–31. The various issues discussed in the Motion to Dismiss concerning probable cause all turn on the resemblance between Plaintiff's driver's license photographs and the depiction of a woman in the video stills from the store surveillance footage. Although these photographs were submitted as exhibits to Defendants' Motion to Dismiss, Plaintiff has not had an opportunity for discovery on this issue, and therefore they will not be considered by the Court at this stage of the case. Viewing all well-pleaded allegations in the Complaint in the light most favorable to the Plaintiff, the Court finds that Plaintiff has sufficiently alleged that there was a lack of probable cause for arrest and has therefore has properly set forth a § 1983 malicious prosecution claim.

B. Qualified Immunity

The test for qualified immunity was stated by the Third Circuit in United Artists Theatre Circuit v. Township of Warrington, 316 F.3d 392 (3d Cir. 2003). Qualified immunity applies so long as the officials' conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Id. at 398. In determining whether qualified immunity should be invoked, there are two primary questions: (1) whether the plaintiff has alleged the deprivation of an actual constitutional right, and if so, (2) whether the right was clearly established at the time of the alleged violation. Id.

It is clear from the discussion above that Plaintiff has alleged a violation of an actual constitutional right, namely her Fourth Amendment right to be free from unreasonable search and seizure. Turning to the second question, Defendants argue that a reasonable person in Nelson's place, based upon a corrected affidavit pointing out the resemblance between Plaintiff and the

woman seen in the surveillance footage, could still have believed that he was not violating Plaintiff's Fourth Amendment rights.

In § 1983 cases alleging a violation of the Fourth Amendment, the question of immunity focuses on whether a reasonable officer could have believed that his conduct was lawful in light of clearly established law and the information in the officer's possession. Sharrar v. Felsing, 128 F.3d 810, 826 (3d Cir. 1997). As the Third Circuit explained in Sharrar:

“Law enforcement officials who ‘reasonably but mistakenly’ conclude that their conduct comports with the requirements of the Fourth Amendment are entitled to immunity. In this way, the ‘qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.’”

Id. (quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991) (additional citations omitted)).

Viewing all well-pleaded allegations in the Complaint in Plaintiff's favor, the Court concludes that the facts as alleged are sufficient to support a finding that no reasonable police officer could have believed that probable cause existed to support the charges against Underwood. Therefore, Defendants' Motion to Dismiss federal claims for damages against Nelson in his individual capacity on the basis of qualified immunity will be denied. Just as in the probable cause analysis above, the Court is bound to examine only the facts alleged in the Complaint, and it is unwilling, at this early stage of the litigation, to hold that Nelson's conclusion as to the resemblance of Plaintiff was necessarily reasonable under the circumstances. Whether Plaintiff's Fourth Amendment rights were violated by Nelson's actions, and thus whether a qualified immunity defense can be invoked, may be considered at a later point in this case after discovery has been conducted on the specific actions and procedures involved in creating the affidavit of probable cause.

V. Conclusion

For the reasons stated above, the federal claims in Count I and all of Count II will be dismissed against the Commonwealth, the State Police, and Nelson in his official capacity. In addition, the substantive due process claim in Count I will be dismissed against Nelson in his individual capacity. The state law claims in Count I are dismissed as to all Defendants. Finally, the Court finds that Plaintiff has sufficiently alleged a cause of action for malicious prosecution under § 1983, and the Motion to Dismiss that claim against Nelson in his individual capacity will be denied.

An appropriate Order follows.

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COMMONWEALTH OF : NO. 05-3452
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ORDER

AND NOW, this 26th day of April, 2006, upon consideration of Plaintiff's Complaint, Defendants' Motion to Dismiss (Doc. No. 3), and the response thereto, it is hereby ORDERED as follows:

1. The Motion to Dismiss Count II and the federal claims within Count I against Defendants Commonwealth of Pennsylvania and the Pennsylvania State Police is GRANTED with prejudice;
2. The Motion to Dismiss the state law claims within Count I against all Defendants is GRANTED with prejudice;
3. The Motion to Dismiss Count I against Defendant Nelson in his official capacity is GRANTED with prejudice;
4. The Motion to Dismiss the substantive due process claim in Count I against Defendant Nelson in his individual capacity is GRANTED with prejudice;
5. The Motion to Dismiss the § 1983 malicious prosecution claim in Count I against Defendant Nelson in his individual capacity is DENIED;

6. Count I of Plaintiff's Complaint alleging malicious prosecution shall be answered by Defendant John Nelson within ten days.

BY THE COURT:

s/ Michael M. Baylson
MICHAEL M. BAYLSON, U.S.D.J.