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

MONICA LATOYA CHERRY	:	CIVIL ACTION
	:	
v.	:	
	:	
CITY OF PHILADELPHIA and	:	NO. 04-1393
SYLVESTER JOHNSON and	:	
LYNNE ABRAHAM	:	

O'NEILL, J. NOVEMBER 15, 2004

MEMORANDUM

This action arises out of events that occurred between February 25, 2002, when plaintiff witnessed a triple-homicide, and April 2, 2004, when plaintiff filed her complaint. Defendant Sylvester Johnson was the Commissioner of the Philadelphia Police Department and defendant Lynne Abraham was the District Attorney of Philadelphia at all times relevant to this case.

The complaint contains seven counts. Counts I and V allege that defendants violated 42 U.S.C. § 1983 by depriving plaintiff: (1) of her right to be free from unreasonable seizure of her person under the Fourth Amendment; (2) of liberty without due process of law under the Fifth and Fourteenth Amendments; and (3) of her Fourteenth Amendment right to equal protection under the law.

Count II alleges common law negligence. Count III alleges intentional infliction of emotional distress committed when defendants seized plaintiff on February 27, 2002.[1] Count IV

[1]Although the complaint labels Count III "Intentional and Negligent Infliction of Emotional Distress," the text indicates that plaintiff seeks to recover damages for intentional infliction of emotional distress.

alleges false imprisonment arising out of the same seizure. Count VI seeks to recover damages for pain and suffering, for medical and rehabilitation expenses, and for loss of the comfort and custody of plaintiff's two children. Count VII seeks to recover plaintiff's reasonable attorney's fees under 42 U.S.C. § 1988. Under Counts I and V (42 U.S.C. § 1983) plaintiff demands treble damages; under Count II (negligence) plaintiff demands punitive damages.

I have before me motions from all defendants to dismiss all counts of plaintiff's complaint, defendants' memoranda of law in support thereof, and plaintiff's response and memorandum of law in opposition thereto.

BACKGROUND

Plaintiff adds numerous allegations of fact in her response to defendants' motions to dismiss; the following includes only facts alleged in the complaint.

On February 25, 2002, plaintiff was at a "speakeasy" (i.e., an after-hours bar/private house) near her home in the Strawberry Mansion area of North Philadelphia. A shootout took place between drug gangs, leaving three people dead and five people wounded. Plaintiff fled the speakeasy when the shooting started.

Soon after the speakeasy shootings Philadelphia police took plaintiff into custody to question her about the shootout.[2] During this interrogation, plaintiff alleges that police told her she was being placed in the city's witness relocation program so that she could testify against the shootout suspects without fear of retaliation. Plaintiff claims that she refused to testify despite being placed in witness protection. Plaintiff asserts that Johnson publicly identified her as a key

[2]The complaint alleges that this interrogation took place in March 2002, but defendants' have provided the Court with an authentic "Investigation Interview Record" showing that it took place on February 27, 2002.

prosecution witness sometime before March 30, 2002. Plaintiff also alleges that "she was told by friends of the suspects in the shootings that she was being watched, and if she'd [sic] agree to testify against the suspects at trial, she would regret it." Compl. ¶ 14.

The complaint alleges that plaintiff "decided to spend [the 2002] Easter Weekend at home." Compl. ¶ 17. On March 30, 2002, the Saturday of Easter weekend, while walking near her home, plaintiff was shot in the head by an unknown assailant. She suffered permanent physical injuries from this attack. Plaintiff believes that the person who shot her did so to keep her from testifying about the speakeasy shooting.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) permits a court to dismiss all or part of an action for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Fed. R. Civ. P. 12(b)(6) does not address the merits of a case but rather tests the legal sufficiency of the complaint. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

In ruling on a 12(b)(6) motion, I must accept as true all well-pleaded allegations of fact, and any reasonable inferences that may be drawn therefrom, in plaintiff's complaint and must determine whether "under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996) (citations omitted). "The complaint will be deemed to have alleged sufficient facts if it adequately put the defendant on notice of the essential elements of the plaintiff's cause of action." Id. Although I must construe the complaint in the light most favorable to plaintiff, I need not accept as true legal conclusions or unwarranted factual inferences. See Conley, 355 U.S. at 45-46. Claims should be dismissed under Rule 12(b)(6) only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of

his claim which would entitle him to relief." Id.

After the same analysis I may dismiss a claim for which no motion to dismiss has been filed. "It is well established that, even if a party does not make a formal motion to dismiss, the court may, sua sponte, dismiss the complaint where the inadequacy of the complaint is clear." Taxacher v. Torbic, 2000 U.S. Dist. LEXIS 15193, at *9 (W.D. Pa. Feb. 23, 2000), aff'd, 251 F.3d 154 (3d Cir. 2000), quoting Michaels v. New Jersey, 955 F. Supp. 315, 331 (D.N.J. 1996).

DISCUSSION

I. Counts I and V - 42 U.S.C. § 1983 - Fourth, Fifth and Fourteenth Amendments

42 U.S.C. § 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In order to state a claim under § 1983, plaintiff "must demonstrate a violation of a right secured by the Constitution and the laws of the United States [and] that the alleged deprivation was committed by a person acting under color of state law." Mark v. Borough of Hatboro, 51 F.3d 1137, 1141 (3d Cir. 1995). I will address plaintiff's claims of violations of her Fourth, Fifth and Fourteenth Amendments rights separately. There is no question that defendants were acting under color of state law.

A. Plaintiff's Fourth Amendment Claim

Plaintiff claims that defendants violated her Fourth Amendment right to be free from unreasonable seizure when in March 2002 police officers took her to a police station after the

shootings. All defendants assert that any claim arising from the alleged March 2002 seizure[3] is barred by the statute of limitations**.** Plaintiff filed her complaint on April 2, 2004. The Pennsylvania statute of limitations governs a claim under 42 U.S.C. § 1983; in this case, the prescribed limitations period is two years. Sameric Corp. of Delaware v. City of Philadelphia, 142 F.3d 582, 599 (3d Cir. 1998), citing 42 Pa. Cons. Stat. § 5524 (2004). Because plaintiff failed to file her complaint within two years of the alleged March 2002 seizure I will dismiss this claim.

In plaintiff's response to defendants' motions to dismiss, she adds allegations of two additional seizures: (1) in June 2002 "for pre-trial interrogation or for re-placement in Defendants' Witness Relocation Program" and (2) in June 2003 prior to and during the trial of the triple-homicide suspects. I will not consider these allegations because "a party may not rely on new facts in submissions in response to a motion to dismiss to defeat the motion." Hammond v. City of Philadelphia, 2001 U.S. Dist. LEXIS 10182, *8 (E.D. Pa. June 29, 2001). I will dismiss plaintiff's Fourth Amendment claim with leave to file an amended complaint in which she may, if she chooses, plead claims regarding the alleged seizures that are not time-barred. See Alston v. Parker, 363 F.3d 229, 235 (3d Cir. 2004).

B. Plaintiff's Fourteenth Amendment Substantive Due Process Claims

Plaintiff alleges that defendants committed various acts that violated her rights under the substantive due process clause of the Fourteenth Amendment. In DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189 (1989), the Supreme Court held that the Fourteenth

[3] Defendants assert that the meeting with police to which plaintiff is referring occurred on February 27, 2002. It is irrelevant whether the meeting occurred in February or March 2002 because the complaint was filed more than two years after the latest alleged date of the seizure.

Amendment's due process clause generally does not impose upon states an affirmative duty to protect individuals against private violence. There are, however, two exceptions to this rule: the special relationship exception and the state created danger exception.

Only state action that shocks the conscience can constitute a violation of substantive due process. County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998). In clarifying this standard, the Lewis court ruled that ordinary negligence is never conscience-shocking, but left open the possibility that recklessness or gross negligence could be. Id. at 848-49. The Court of Appeals has read Lewis as requiring "more culpability . . . to shock the conscience to the extent that state actors are required to act promptly and under pressure," adding that "the same is true to the extent that responsibilities of the state actors require a judgment between competing, legitimate interests." Schieber v. City of Philadelphia, 320 F.3d 409, 419 (3d Cir. 2003). I will be mindful of the Supreme Court's requirement of "an exact analysis of circumstances before any abuse of power is condemned as conscience shocking." Lewis, 523 U.S. at 849.

1. The Special Relationship Exception

The special relationship exception to the general rule that the Due Process Clause does not impose on the state an affirmative duty to protect its citizens from private actors is based on the statement in DeShaney that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being . . . ." DeShaney, 489 U.S. at 200. Plaintiff alleges that defendants created a special relationship with her by placing her in a witness relocation/protection program and that the manner in which defendants conducted the witness relocation/protection program shocks the conscience**.**

Several district courts that have discussed similar situations. In G-69 v. Degnan, 745 F. Supp. 254 (D.N.J. 1990), the Court found that a special relationship existed between the state and an undercover informant to whom protection had been promised. Id. at 265. In Clarke v. Sweeney, 312 F. Supp. 2d 277 (D. Conn. 2004), the Court found that no special relationship was created between the state and a fact witness to a crime who went to the police station to report the crime and was later subpoenaed to testify at the criminal trial. Id. at 296. The most recent decision discussing the issue is Rivera v. Rhode Island, 312 F. Supp. 2d 175 (D.R.I. 2004). The Rivera plaintiff's daughter was a witness to a murder, asked by the police to identify the man she saw and subpoenaed to testify against him before she was murdered. The Court found no special relationship because there was no restraint on the witness' liberty. Id. at 181.

The interaction between plaintiff and defendants in this case is more like that in Clarke and Rivera than the interaction in G-69. Plaintiff was a fact witness rather than an undercover informant. She claims to have been placed in a witness relocation/protection program, but does not allege that she was not free to leave that program. Furthermore, even if plaintiff pleaded that she had been subpoenaed to testify, the compulsion created by a subpoena does not create a special relationship. Rivera, 312 F. Supp. 2d at 181, Clarke, 312 F. Supp. 2d at 296. Plaintiff's complaint does not plead that she was taken into police custody, held against her will and harmed while in police custody and, therefore, the complaint does not plead that a special relationship was created.

2. The State-created Danger Exception

The second exception to the DeShaney rule is the state-created danger exception. The Court of Appeals adopted the state-created danger exception in Kneipp v. Tedder, 95 F.3d 1199

(3d Cir. 1996). In order to recover under this exception, plaintiff must prove that:

(1) the harm ultimately caused was foreseeable and fairly direct;
(2) the state actor acted in willful disregard for the safety of the plaintiff;
(3) there existed some relationship between the state and the plaintiff; and
(4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.

Id. at 1208. The Court of Appeals has refined the second Kneipp element to require conscience-shocking behavior by the state actor. Schieber v. City of Philadelphia, 320 F.3d 409, 417 (3d Cir. 2003).

In Count I, plaintiff alleges that defendants are liable under § 1983 because they allowed "a 'state created danger' to exist and dominate the Plaintiff's community, including a four block radius area from Plaintiff's home." Compl. ¶ 28. Plaintiff also alleges that Johnson is liable for the state created danger because he publicly identified plaintiff as a key witness in the prosecution of the suspects in the February 25, 2002 triple-homicide. I will dismiss the claims for state created danger which plaintiff claims existed before and after the speakeasy shootings because of alleged police neglect. I will not dismiss the claim against Johnson for public identification.

a. State-created Danger in Plaintiff's Neighborhood

Plaintiff claims that defendants caused a state-created danger to exist "by failing to impose order in the immediate neighborhood where Plaintiff and the primary suspects in the speakeasy shootings lived" and that the danger existed before the speakeasy shootings. Compl. ¶ 21. The dangerous neighborhood that plaintiff describes does not meet the fourth Kneipp factor because the state actors did not use their authority to affirmatively create an opportunity that otherwise would not have existed for the third party's crime to occur. Plaintiff admits in her

complaint that the "police department targets Strawberry Mansion as one of its primary areas of concern, since 2002 and at all times relevant hereto." Compl. ¶ 9. The fact that the neighborhood remains dangerous is insufficient to establish a claim for a state-created danger.

b. State-created Danger via Public Identification

I find that Johnson may be liable under the state-created danger theory for publicly identifying plaintiff as a prosecution witness. However, since plaintiff has not alleged a policy of publicly identifying witnesses, I will dismiss this claim against defendant City of Philadelphia.

Plaintiff's shooting was a foreseeable and fairly direct result of Johnson's public declaration. Accepting plaintiff's allegations as true, defendants feared enough for plaintiff's safety to offer her protection in the city's witness relocation program. Moreover, defendants knew that the triple-homicide suspects (or their associates) were the ones who might harm plaintiff.

Johnson's alleged public identification of plaintiff as a prosecution witness constitutes conscience-shocking conduct within the meaning of Lewis. Johnson's alleged conduct is conscience-shocking under the deliberate indifference standard. Johnson has not alleged he was under any pressure to identify plaintiff publicly, and there is no allegation that he was forced to balance any competing priorities. Johnson's alleged decision to place plaintiff in a witness protection program demonstrates that he was aware of an excessive risk of serious harm to her; if he indeed publicly identified her, plaintiff may also prove that he consciously disregarded this risk.

The Kneipp requirement of a relationship between the plaintiff and the state is different from the special relationship exception. This Kneipp element requires "contact such that the

plaintiff was a foreseeable victim of the defendant[s'] acts in a tort sense." Kneipp, 95 F.3d at 1209 n.22. In this Circuit a plaintiff need only be a member of a "sufficiently discrete group of persons who could have been foreseeable victims." Morse, 132 F.3d at 914. Plaintiff has pleaded this element sufficiently.

Finally, I find the complaint properly alleges that Johnson "used [his] authority to create an opportunity that otherwise would not have existed for [plaintiff's shooting] to occur." Kneipp, 95 F.3d at 1208. The Sixth Circuit reached the same conclusion on similar facts in Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998). The Kallstrom Court reasoned that "[i]n affirmatively releasing private information from the [undercover] officers' personnel files to defense counsel . . . the City's actions placed the personal safety of the officers and their family members . . . in serious jeopardy." Kallstrom, 136 F.3d at 1067. Although plaintiff in this case did not enjoy anonymity, I find that the pleading of the facts surrounding Johnson's alleged public declaration satisfies this factor of the Kneipp test for the purposes of the present motion. Johnson's motion to dismiss plaintiff's substantive due process claim will be denied with respect to the claim of public identification of plaintiff as a prosecution witness.

C. Plaintiff's Fifth Amendment Substantive Due Process Claim

Citing the same conduct as under her Fourteenth Amendment substantive due process claim, plaintiff alleges that defendants violated her substantive due process rights under the Fifth Amendment. The due process clause of the Fifth Amendment applies only to the conduct of federal actors. Huffaker v. Bucks County Dist. Attorney's Office, 758 F. Supp. 287, 290 (E.D. Pa 1991). In this case, none of the three defendants is a federal actor. Nor does the complaint allege a connection between defendants and the federal government that would allow a claim

under the doctrine of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). An allegation of federal involvement first emerges in plaintiff's response to defendants' motions to dismiss. Response, ¶ 4 ("Defendants acted in concert with, or, in regards to its 'Witness Relocation Program' worked with, or deferred to, certain federal actors . . . ."). As with plaintiff's Fourth Amendment claims arising from the June 2002 and June 2003 seizures, I will apply the rule of Alston. See Alston, 363 F.3d at 235. I will dismiss plaintiff's Fifth Amendment claim with leave to amend.

D. Plaintiff's Fourteenth Amendment Procedural Due Process Claim

In her response, plaintiff adds an allegation that she was not "advised of her constitutional rights at any stage of her contacts with defendants." Response, ¶ 12. Because plaintiff did not assert this claim in her complaint, I will disregard it for the purposes of this motion. Hammond, 2001 U.S. Dist. LEXIS 10182, *8.

E. Plaintiff's Fourteenth Amendment Equal Protection Claim

Plaintiff alleges that defendants discriminated against her and against her neighborhood by not providing adequate police protection. I will dismiss this claim because the complaint does not state a claim for a violation of the equal protection clause. Plaintiff states that the "police department targets Strawberry Mansion as one of its primary areas of concern, since 2002 and at all times relevant hereto." Compl. ¶ 9. If plaintiff's neighborhood was a primary area of concern for the police department, then the police department was giving that area more attention than other areas of the city, not less attention. That the police department was not successful at making plaintiff's neighborhood safer does not indicate that the neighborhood was treated differently than others. The claim will be dismissed as to all defendants

II. Count II - Negligence

Defendants correctly note that the Pennsylvania Political Subdivision Tort Claims Act (PSTCA), 42 Pa. Cons. Stat. § 8542, immunizes them from plaintiff's claim of common law negligence. This statute declares that local agencies (including cities) are not liable for their own or their employees' negligent acts unless they fall within one of eight enumerated categories, none of which applies to this case.[4] Moser v. Bascelli, 865 F. Supp. 249 (E.D. Pa. 1994). I will dismiss Count II of the complaint.

III. Count III - Intentional Infliction of Emotional Distress and Count IV- False Imprisonment

Defendant City of Philadelphia is immune from these claims under the PSTCA, because the statute specifically provides for municipal immunity for intentional torts. 42 Pa. Cons. Stat. § 8542(a)(2) (2004); Lakits v. York, 258 F. Supp. 2d 401, 405 (E.D. Pa. 2003). Defendant Abraham also is immune from these claims because, under Pennsylvania law, a "high public official" such as herself is "immune from suits seeking damages for actions taken or statements made in the course of [her] official duties." Durham v. McElynn, 772 A.2d 68, 69 (Pa. 2001). Therefore, I will dismiss Counts III and IV against defendants Abraham and City of Philadelphia.

Johnson, however, could be liable for intentional infliction of emotional distress and false imprisonment, because the PSTCA does not grant individuals immunity from intentional torts. 42 Pa. Cons. Stat. § 8542(a)(2) (2004); Holloway v. Brechtse, 279 F. Supp. 2d 613, 615 (E.D. Pa. 2003). However, the complaint bases these claims on the February 27, 2002 seizure and,

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[4]These categories are: (1) vehicle liability; (2) care, custody or control of personal property; (3) real property; (4) trees, traffic controls and street lighting; (5) utility service facilities; (6) streets; (7) sidewalks; and (8) care, custody or control of animals. 42 Pa. Cons. Stat. § 8542 (2004).

therefore, those claims are time-barred and will be dismissed.

IV. Count VI - Pain and Suffering, Medical Expenses and Loss of Consortium

Plaintiff seeks damages for pain and suffering, for medical expenses, and for loss of consortium. Insofar as this claim is a derivative of plaintiff's remaining § 1983 claim and common law claims, it is not dismissed.

V. Count VII - 42 U.S.C. § 1988 - Attorney's Fees

Plaintiff seeks attorney's fees under 42 U.S.C. § 1988. I will not dismiss this claim, because one of plaintiff's § 1983 claims survives this motion to dismiss.

An appropriate Order follows.

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ORDER

AND NOW, this 15th day of November, 2004, after consideration of defendants' motions to dismiss and plaintiff's memorandum of law in opposition thereto, and for the reasons set forth in the accompanying memorandum, defendants' motions to dismiss are DENIED as to

(1) the Fourteenth Amendment Due Process claim regarding state-created danger resulting from Johnson's alleged public identification of plaintiff as a key prosecution witness;

(2) the intentional infliction of emotional distress and false imprisonment claims against Police Commissioner Sylvester Johnson;

(3) the claim for pain and suffering and medical expenses; and

(4) the claim for attorney's fees under 42 U.S.C. § 1988.

The defendants' motions to dismiss are GRANTED as to all other claims and those claims are DISMISSED.

Plaintiff is granted leave to amend the her Complaint regarding her claims of unreasonable seizure under the Fourth Amendment, violation of substantive due process under the Fifth Amendment and violation of procedural due process under the Fourteenth Amendment.

s/ Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR., J.