

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

MARY ANN CIARLONE, et al. : Civil Case
Plaintiffs, :
 :
v. : No. 09-310
 :
CITY OF READING, et al. :
Defendants, :

MEMORANDUM OPINION

Stengel, J.

January 19, 2011

Mary Ann Ciarlone owns property located at 511 Oley Street, Reading, Pennsylvania. Irene Lora, Orazio Gerbino, and Anne Baez each rent an apartment at the property. The City of Reading sent notice to Ms. Ciarlone that the property would be inspected. Ms. Ciarlone requested the inspectors obtain a search warrant. The inspectors obtained a search warrant, and returned to conduct the inspection. The inspectors did not inform the tenants of the inspection or search warrant and used a sledge hammer to gain access to the property.

Thomas McMahon, Jatinder Khokhar, and Ryan Hottenstein filed this motion for summary judgment.¹ For the reasons set forth below, I will grant the motion.

¹ The City of Reading, Code Enforcement Administrator Brad Reinhart and Code Enforcement Inspector James Orrs have filed a separate motion for summary judgment and plaintiffs filed a partial motion for summary judgment. These motions are addressed in separate memorandum opinions and/or orders.

I. Background

Mary Ann Ciarlone owns a residential rental property at 511 Oley Street, Reading, Pennsylvania.² Irene Lora, Anne Baez, and Orazio Gerbino live as tenants at 511 Oley Street. Defendants' Statement of Facts at ¶¶ 2-4. Brad Reinhart is the codes administrator for the City of Reading, id. ¶ 5, and James Orrs was a property maintenance inspector for the City of Reading, id. at ¶ 6. Thomas McMahon is the Mayor of the City of Reading. Id. at ¶ 7. In 2008, Ryan Hottenstein was the managing director of the City of Reading. Id. at ¶ 8. On October 10, 2008, Jatinder Khokhar was the manager of the office of building inspections and zoning services. Id. at ¶ 9.

Through a letter dated September 24, 2008, the City of Reading notified Ms. Ciarlone that a property maintenance inspection for 511 Oley Street was scheduled for October 7, 2008. Defendants' Statement of Facts at ¶ 17. The City of Reading did not provide notice of the inspection to the tenants. Id. at ¶ 18. At the request of Ms. Ciarlone, Mr. Orrs obtained a search warrant. Mr. Orrs, Mr. Reinhart, and a police officer went to the property to execute the warrant on October 10, 2008. Defendants' Statement of Facts at ¶ 41. No one was at the property. Mr. Reinhart asked Mr. Orrs to call Ms. Ciarlone and inform her they would return that afternoon to execute the warrant. Id. at ¶ 45. At approximately 4:00 p.m. Mr. Reinhart and Mr. Orrs returned to the

² See Defendants, City of Reading, Thomas McMahon, Ryan Hottenstein, Brad Reinhart, Jatinder Khokhar and James Orrs' Statement of Undisputed Facts at ¶ 1, Ciarlone v. City of Reading, No. 09-310 (E.D. Pa. filed Nov. 10, 2010).

property with two officers. Id. at ¶ 47. After 50 minutes of requesting Ms. Ciarlone to open the door, they used a sledge hammer to gain access to the property. Id. at ¶¶ 54, 69. They also used the sledge hammer to gain access to the tenants' apartments. Id. at ¶ 71.

In 2008 Mr. Khokhar was the manager for the offices of building inspections, zoning services, and code enforcement. Defendants' Statement of Facts at ¶ 83. In July or August 2008, the responsibilities for the code enforcement division were taken from Mr. Khokhar and given to Mr. Reinhart. Id. at ¶ 85. In October 2008, Mr. Khokhar had no supervisory responsibilities for the code enforcement division, was not responsible for the division's training, and did not have authority to fire or discipline Mr. Reinhart or Mr. Orrs. Id. at ¶ 87. Prior to the execution of the search warrant on 511 Oley Street, Mr. Khokhar did not know anything about the scheduled inspection or that a search warrant had been issued. Id. at ¶ 88.

As managing director for the City of Reading, Mr. Hottenstein was responsible for the overall management of city operations. Defendants' Statement of Facts at ¶ 94. Prior to the execution of the warrant, Mr. Hottenstein did not know anything about the scheduled inspection of 511 Oley Street or about the execution of the search warrant. Id. at ¶ 101.

Mayor McMahon helps formulate policy, goals and objectives for the City of Reading on a "macro level." Defendants Statement of Facts at ¶ 103. He does not create procedures for the code enforcement division. The heads of the departments are

responsible for creating procedures. Id. at ¶ 104. Mayor McMahon testified the department heads are responsible for investigating and disciplining the employees in their departments. Defendants’ Statement of Facts at Exh. 7 at 138.

Mayor McMahon explained his administration “possibly” had a “zero tolerance policy towards code enforcement” that was not documented. He hoped “that code enforcement would not neglect violations or enforcement of ordinances for violations.” Plaintiffs’ Statement of Facts at Appendix F at 54-56, Ciarlone v. City of Reading, No. 09-319 (E.D. Pa. filed Nov. 12, 2010). He testified at his deposition that the police accompany code enforcement officers to give the inspections legitimacy and it has been a policy of his administration to “get landlords to take the property inspection scheme more seriously.” Id. at 61.

Mayor McMahon’s administration had a goal to “limit rental housing to the elderly and to the special needs.” Plaintiffs’ Statement of Facts at Appendix F at 33. This is in part because of the “broken windows theory,”³ which promotes stability in a

³ In his 2006 State of the City Speech, Mayor McMahon summarized the “broken windows theory” as:

James Q. Wilson and George Kelling developed the “broken windows” thesis to explain the signaling function of neighborhood characteristics. This thesis suggests that the following sequence of events can be expected in deteriorating neighborhoods:

Evidence of decay (accumulated trash, broken windows, deteriorated building exteriors) remain in the neighborhood for a reasonably long period of time. People who live and work in the area feel more vulnerable and begin to withdraw. They become less willing to intervene to maintain public order (for example, to

neighborhood to reduce crime. See Plaintiffs' Statement of Facts at Exh. F at 35.

Between 2007 and 2008, there was a 400 percent increase in conviction rates for code violations. Id. at 50. In addition, Karen Organtini, a clerk with the property maintenance division, was deposed in 2009. She testified that for the two years preceding the deposition there had been a shift in policy regarding property maintenance inspections to make them "more intense." Plaintiffs' Statement of Facts at Appendix A at 25.

Prior to the execution of the search warrant at 511 Oley Street, Mayor McMahon never discussed or suggested to anyone that an inspection of the property should be conducted or that a warrant should be obtained. Defendants' Statement of Facts at ¶ 107.

He also did not discuss how the warrant should be executed. Id. at ¶ 108.

The City of Reading provides training to its property maintenance inspectors,

attempt to break up groups of rowdy teens loitering on street corners) or to address physical signs of deterioration.

Sensing this, teens and other possible offenders become bolder and intensify their harassment and vandalism.

Residents become yet more fearful and withdraw further from community involvement and upkeep. This atmosphere then attracts offenders from outside the area, who sense that it has become a vulnerable site for crime.

The "broken window" theory suggests that neighborhood order strategies such as those listed below help to deter and reduce crime.

- Quick replacement of broken windows
- Prompt removal of abandoned vehicles
- Fast clean up of illegally dumped items, litter and spilled garbage
- Quick paint out of graffiti
- Finding (or building) better places for teens to gather than street corners
- Fresh paint on buildings
- Clean sidewalks and street gutters

including International Code Council seminars. See Defendants' Statement of Facts at Exh. 6 at 16-17. In June 2008, the City of Reading conducted a required training session for all code enforcement officers. Id.; Defendants' Statement of Facts at Exh. 5 at 37-38.⁴ The June 2008 instructors included attorneys from the law firm of Deasey, Mahoney, Valentini & North, Ltd. and Captain Drexler and Sergeant Monteiro of the City of Reading Police Department. See Defendants' Statement of Facts at Exh. 6 at 60; Defendants' Statement of Facts at Exh. 22. The training included training on the right to entry, how to prepare an affidavit of probable cause, prohibition against retaliation, sensitivity to the possible perception of harassment and intimidation, and civil rights under the Fourth Amendment to the United States Constitution. See Defendants' Statement of Facts at Exh. 22. There was no training on the use of force during a planned routine inspection. There were no written guidelines or standard operating procedures for serving administrative search warrants.

The Complaint alleges a Fourth Amendment unreasonable search claim, a violation of the right to privacy claim, a First Amendment retaliation claim, and a failure to train claim against Mr. Khokhar, Mr. Hottenstein, and Mayor McMahon. Mr. Khokhar, Mr. Hottenstein, and Mayor McMahon filed a motion for summary judgment alleging plaintiffs fail to establish they are personally liable for any constitutional

⁴ Plaintiffs maintain this training did not occur until February, 2009. Mr. Khokhar, Mr. Reinhart, and Mr. Orrs all testified that there was training in June 2008. Mr. Reinhart and Mr. Orrs testified training also occurred in February 2009.

violation and fail to establish they are liable for a failure to train the code enforcement division employees.

II. Standard

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). An dispute is “genuine” when “a reasonable jury could return a verdict for the nonmoving party” based on the evidence in the record. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is “material” when it “might affect the outcome of the suit under the governing law.” Id.

A party seeking summary judgment initially bears responsibility for informing the court of the basis for its motion and identifying those portions of the record that “it believes demonstrate the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party’s initial Celotex burden can be met simply by demonstrating to the district court that “there is an absence of evidence to support the non-moving party’s case.” Id. at 325. After the moving party has met its initial burden, the adverse party’s response must cite “particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only),

admissions, interrogatory answers, or other materials” Fed. R. Civ. P. 56(c)(1).

Summary judgment is therefore appropriate when the non-moving party fails to rebut by making a factual showing that is “sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex, 477 U.S. at 322.

Under Rule 56 of the Federal Rules of Civil Procedure, the court must draw “all justifiable inferences” in favor of the non-moving party. Anderson, 477 U.S. at 255. The court must decide “not whether . . . the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.” Id. at 252. If the non-moving party has produced more than a “mere scintilla of evidence” demonstrating a genuine issue of material fact, then the court may not credit the moving party’s “version of events against the opponent, even if the quantity of the [moving party’s] evidence far outweighs that of its opponent.” Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

III. Discussion

A. Individual Liability

Plaintiffs’ complaint alleges an unreasonable search and seizure claim (Count I), a violation of the right to privacy claim (Count III), and an unconstitutional retaliation

claim (Count IV) against Mr. Khokhar, Mr. Hottenstein, and Mayor McMahon.⁵

A defendant is liable under § 1983 only if he personally was involved in the alleged constitutional violation. Robinson v. City of Pittsburgh, 120 F.3d 1286, 1294 (3d Cir. 1997), abrogate in part on other grounds by Burlington N. And Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006). A plaintiff can sue a defendant in a personal capacity action under two theories of supervisory liability. See A.M. Luzerne Cnty. Juvenile Det. Ctr., 372 F.3d 572, 586 (3d Cir.2004); accord Hill v. City of Phila., 2008 WL 2622907, at *5 (E.D.Pa. June 30, 2008). A plaintiff can establish supervisory liability if he shows a supervisor “participated in violating the plaintiff’s rights, directed others to violate them, or, as the person in charge, had knowledge of and acquiesced in his subordinates’ violations.” A.M. Luzerne Cnty. Juvenile Det. Ctr., 372 F.3d at 586 (quoting Baker v. Monroe Twp., 50 F.3d 1186, 1190-91 (3d Cir.1995)); accord Santiago v. Warminster Twp., – F.3d –, 2010 WL 5071779, at *4 (3d Cir. Dec. 14, 2010). Alternately, a plaintiff can establish supervisory liability if he shows the defendants “with deliberate indifference to the consequences, established and maintained a policy, practice, or custom which directly caused [the] constitutional harm.” Id. (quoting Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 725 (3d Cir.1989)).

⁵ These claim also are alleged against the City of Reading, Mr. Reinhart, and Mr. Orrs. The allegations against the City of Reading, Mr. Reinhart, and Mr. Orrs are addressed in a separate memorandum opinion.

1. Jatinder Khokhar

Mr. Khokhar had no responsibility for the code enforcement division in October 2008.⁶ He did not order an inspection of the property or order anyone to obtain a search warrant for the property. Mr. Khokhar learned of the search of the property after it occurred. Mr. Reinhart and Mr. Orrs testified Mr. Khokhar did not know anything about the scheduled inspection or that they had obtained a search warrant. They also testified Mr. Khokhar did not order, direct, or suggest a search warrant be executed or order, direct, or suggest how the search warrant should be executed.

Plaintiffs fail to establish a jury could find Mr. Khokhar “participated in violating the plaintiff[s’] rights, directed others to violate them, or, as the person in charge, had knowledge of and acquiesced in his subordinates’ violations.” There are no facts developed during discovery which might show any involvement by Mr. Khokhar. He was not involved and about that there is no question of fact at all.

2. Ryan Hottenstein

Plaintiffs fail to establish a jury could find Mr. Hottenstein “participated in violating the plaintiff[s’] rights, directed others to violate them, or, as the person in charge, had knowledge of and acquiesced in his subordinates’ violations.” Mr. Orrs and

⁶ Mr. Khokhar was removed from his position as manager of the code division in July or August 2008. Mr. Khokhar was the manager of three divisions, the offices of building inspections, zoning services, and code enforcement. The responsibilities over the code enforcement division were taken away from Mr. Khokhar and given to Mr. Reinhart.

Mr. Reinhart testified that Mr. Hottenstein did not know anything about the scheduled search or its execution until after it occurred. He did not direct, cause, or suggest a search warrant be obtained or order, cause, or suggest how the warrant should be executed.

3. Mayor Thomas McMahon

Mr. Orrs and Mr. Reinhart testified Mayor McMahon did not know anything about the scheduled search or its execution until after it occurred. He did not direct, cause, or suggest a search warrant be obtained or how the warrant should be executed.

Mayor McMahon's administration had a goal of limiting rental housing to the elderly and to those with special needs. Mayor McMahon was concerned with the "broken windows theory," and believed a reduction in rental housing would result in a reduction in crime. Code enforcement under his administration had become more strict and there was a 400 percent increase in convictions for code violations from 2007 to 2008. In addition, plaintiffs maintain Mayor McMahon replaced Mr. Khokhar with Mr. Reinhart to enforce the new policy.

Plaintiffs fail to establish a jury could find Mayor McMahon is liable for any constitutional violation. The McMahon administration policy to reduce code violations and its policy limiting rental housing to the elderly and to those with special needs do nothing to establish Mayor McMahon participated in any violation of the plaintiffs' rights. Plaintiffs also have not established and show no proof at all that these policies

were a direct cause of any violation of plaintiffs' constitutional rights.

4. Conclusion

I will grant Mr. Khokhar, Mr. Hottenstein, and Mayor McMahon summary judgment for plaintiffs' unreasonable search and seizure claim, violation of the right to privacy claim, and unconstitutional retaliation claim.

B. Failure to Train

Count II of plaintiffs' complaint raises a failure to train claim against Mr. Khokhar, Mr. Hottenstein, and Mayor McMahon.⁷

“[T]he standard for personal liability under section 1983 is the same as that for municipal liability.” Carter v. City of Phila., 181 F.3d 339, 356 (3d Cir. 1999). “[W]hen execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts and acts may fairly be said to represent official policy, inflicts the injury . . . the government as an entity is responsible under § 1983.” Id. If “the policy in question concerns a failure to train or supervise municipal employees, liability under section 1983 requires a showing that the failure amounts to ‘deliberate indifference’ to the rights of persons with whom those employees will come into contact.” Id. (quoting City of Canton v. Harris, 489 U.S. 378, 388 (1989)). The “failure to train may amount to

⁷ The failure to train claim also is alleged against Mr. Reinhart. The allegations against Mr. Reinhart are addressed in a separate memorandum opinion.

deliberate indifference where the need for more or different training is obvious, and inadequacy very likely to result in violation of constitutional rights.” Id.

1. Jatinder Khokhar

After August 2008, Mr. Khokhar was not responsible for the code enforcement division. Mr. Reinhart was authorized to develop new policies and procedures for the code enforcement division.

Mr. Khokhar arranged training for the code enforcement division when he was in charge. In June 2008, four months before the execution of the search warrant at 511 Oley Street, the City of Reading conducted a training session for all code enforcement officers. The training addressed the right of entry, preparation of an affidavit of probable cause, prohibition against retaliation, sensitivity to the possible perception of harassment and intimidation, and the Fourth Amendment.

Plaintiffs fail to establish a genuine issue of material fact about Mr. Khokhar’s involvement. There is no basis in the facts of this case to find Mr. Khokhar deliberately indifferent to the plaintiffs’ rights. When he was manager of the code enforcement division, he provided training to the property inspectors. Even if the training was inadequate (a proposition for which there is no support), plaintiffs fail to establish that the need for additional training was obvious or that inadequate training was likely to cause a violation of plaintiffs’ constitutional rights.

2. Ryan Hottenstein and Mayor Thomas McMahon

Plaintiffs fail to establish a genuine issue of material fact for the failure to train claim against Mr. Hottenstein and Mayor McMahon.

Even if they had a responsibility to assure training, a reasonable jury could not find that they were deliberately indifferent to the plaintiffs' rights. Mr. Khokhar had arranged training for the code enforcement officers in June 2008. Even if the training was inadequate, plaintiffs fail to establish a jury could find the need for additional training was obvious or that inadequate training was likely to result in a violation of constitutional rights. Same as Mr. Khokhar, there are no facts at all to show "inadequate training" and no question of fact over whether any "inadequate training" caused injury to the plaintiffs.

3. Conclusion

I will grant defendants summary judgment motion regarding the failure to train claim against Mr. Khokhar, Mr. Hottenstein, and Mayor McMahon.

An appropriate order follows.

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

MARY ANN CIARLONE, et al.	:	Civil Case
Plaintiffs,	:	
	:	
v.	:	No. 09-310
	:	
CITY OF READING, et al.	:	
Defendants,	:	

ORDER

AND NOW, this 20th day of January, 2011, upon consideration of defendants, Jatinder Khokhar, Ryan Hottenstein, and Thomas McMahon's motion for summary judgment (Doc. # 78), and all responses and replies thereto, **IT IS HEREBY ORDERED** that the motion is **GRANTED**.

BY THE COURT:

/s/ LAWRENCE F. STENGEL

LAWRENCE F. STENGEL, J.

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

MARY ANN CIARLONE, et al. : Civil Case
Plaintiffs, :
 :
v. : No. 09-310
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CITY OF READING, et al. :
Defendants, :

MEMORANDUM OPINION

Stengel, J.

January 20, 2011

Mary Ann Ciarlone owns 511 Oley Street, located in Reading, Pennsylvania. In 2008, Irene Lora, Orazio Gerbino, and Anne Baez each rented apartments at the property. Defendants planned a code enforcement inspection for the property and notified Ms. Ciarlone. Ms. Ciarlone requested defendants obtain a search warrant, which they did. After obtaining the warrant, Code Enforcement Administrator Brad Reinhart and Code Enforcement Inspector James Orrs searched the property. Mr. Orrs and Mr. Reinhart did not provide notice to the tenants prior to the search and used force to enter the apartments of the three tenants. Ms. Ciarlone and her tenants filed claims for violations of their constitutional rights.

The City of Reading, Mr. Reinhart, and Mr. Orrs filed this motion for summary judgment.⁸ For the reasons set forth below, I will grant the motion in part and deny it in

⁸ Defendants Thomas McMahan, Jatinder Khokhar, and Ryan Hottenstein filed a separate motion for summary judgment and plaintiffs filed a partial motion for summary judgment. These motions are addressed in separate memorandum opinions and/or orders.

part.

I. Background

Mary Ann Ciarlone owns a residential rental property at 511 Oley Street, Reading, Pennsylvania.⁹ Irene Lora, Anne Baez, and Orazio Gerbino live as tenants at 511 Oley Street. Defendants' Statement of Facts ¶ 2-4. Brad Reinhart is the codes administrator for the City of Reading, id. ¶ 5, and James Orrs was a property maintenance inspector for the City of Reading, id. at ¶ 6. Prior to October 10, 2008, the City of Reading had not inspected 511 Oley Street since October 12, 1999 and Ms. Ciarlone had not had 511 Oley Street inspected by a private inspector. Defendants' Statement of Facts at ¶¶ 13, 34.

The City of Reading has a Property Maintenance Code and a Housing-Rental Ordinance, which requires the inspection of rental properties every three years. Id. at ¶¶ 14-15. Through a letter dated September 24, 2008, the City of Reading notified Ms. Ciarlone that a property maintenance inspection for 511 Oley Street was scheduled for October 7, 2008. Id. at ¶ 17. The City of Reading did not provide notice of the inspection to the tenants. Id. at ¶ 18. Ms. Ciarlone did not tell the tenants she had received a notice of inspection. Id. at ¶ 21.

On October 7, 2008, Ms. Ciarlone taped a poster to a chair on the porch of 511

⁹ See Defendants, City of Reading, Thomas McMahon, Ryan Hottenstein, Brad Reinhart, Jatinder Khokhar and James Orrs' Statement of Undisputed Facts at ¶ 1, Ciarlone v. City of Reading, No. 09-310 (E.D. Pa. filed Nov. 12, 2010).

Oley Street, stating:

NOTICE

10-7-08

To City of Reading: I/we want our constitutionally and charter protected rights! Attempts by you to enter these premises using police tactics are a violation of these rights. If you return with a warrant, you must immediately call 610-334-7875.

I reserve the right to monitor your presence for quality assurance. Mary Ann Ciarlone

Defendants' Statement of Facts at ¶ 22.

On October 7, 2008 at 4:48 p.m., Mr. Orrs appeared at 511 Oley Street pursuant to the notice of inspection. Id. at ¶ 23. Prior to October 7, 2008, Ms. Ciarlone had never met Mr. Orrs. Id. ¶ 24. Ms. Ciarlone video recorded the encounter. Id. During the encounter, Ms. Ciarlone stated: "I am asserting my constitutionally and charter protected right to ask for a warrant." Id. at ¶ 25.

On October 9, 2008, Mr. Orrs completed an affidavit of probable cause and application for a search warrant for 511 Oley Street. Defendants' Statement of Facts at ¶ 27. City of Reading Assistant Solicitor Michelle Mayfield, Esquire, helped Mr. Orrs complete the application for a search warrant. Id. at ¶ 28. Mr. Orrs stated he consults with legal counsel when applying for a warrant, see Defendants' Motion at Exh. 6 at 60, but clarified he had made only one other application for a warrant to search rental property, id.

On the application for search warrant, where it requests "Name of Owner, Occupant or Possessor of said Premises to be Search," Officer Orrs wrote:

Owners Craig A. Ciarlone and Maryann Ciarlone of 709 North 5th Street, Reading, County of Berks, Pennsylvania and Occupants of 511 Oley Street O. Gerbino, I. Lora, A. Ciarlone, A. Baez and/or John Doe 1, John Doe 2, Jane Doe 1 and/or Jane Doe 2.

Mr. Orrs maintained he did not include a statement of whether the tenants had granted or refused access to the property in the affidavit of probable cause “[b]ecause I talked to [Ms. Ciarlone], and she was the one that did not allow me in the property and requested a search warrant.” Id. at ¶ 36. He did not recall if Ms. Ciarlone explained whether her tenants had granted or refused access. Id. Mr. Reinhart did not assist Mr. Orrs in completing the application for a search warrant and did not provide any information contained in the application. Id. at ¶ 37. Mr. Reinhart was present on October 9, 2008, when the application was submitted. Id. at ¶ 38. On October 9, 2008, District Justice Thomas H. Xavios approved the administrative search warrant. Id. at ¶ 39.

On October 10, 2008, Mr. Orrs requested a City of Reading police officer accompany him to execute the search warrant. Defendants’ Statement of Facts at ¶ 41. Mr. Orrs stated it was standard procedure for police to accompany the property maintenance inspectors when executing a search warrant to provide security. See Defendants’ Motion at Exh. 6 at 80. He also stated that before October 10, 2008 he had never requested the assistance of a police officer to execute a warrant, requested a warrant for a property inspection for only one other property, and had asked for police assistance only when there were open and unsecure properties that needed to be boarded up. Id. at 79.

On October 10, 2008, Mr. Orrs, Mr. Reinhart, and a police officer went to 511 Oley Street around 9:00 a.m. or 10:00 a.m. to execute the administrative search warrant. No one was present when they arrived. Mr. Reinhart instructed Mr. Orrs to return to City Hall to call Ms. Ciarlone and advise her that they would return in the afternoon to execute the search warrant. Defendants' Statement of Facts at ¶ 45. Mr. Reinhart and Mr. Orrs returned to 511 Oley Street at 4:00 p.m. on October 10, 2008. Id. at ¶ 47. Ms. Ciarlone and her friend Tina Fuhrman videotaped the execution of the search warrant. Id. at ¶ 48.

Mr. Reinhart and Mr. Orrs met two police officers at 511 Oley Street. The City of Reading Police Department policy is to send two police officers for any call. Id. at ¶ 50. One of the responding officers, Officer Eric Sweitzer, called his on-duty supervisor, Sergeant Marc Pentheny. Officer Sweitzer testified that he had never been trained "on any code enforcement procedures before October 10, 2008" and that he had never interacted with any of the codes administrators, officers, or agents before that day. Plaintiffs' the Statement of Facts at Appendix I at 8, 15, Ciarlone v. City of Reading, No. 09-310 (E.D. Pa. filed Nov. 12, 2010).

Over a period of approximately fifty minutes, Mr. Reinhart, Officer Sweitzer and Sergeant Pentheny asked Ms. Ciarlone to comply with the administrative search warrant and permit the inspection of 511 Oley Street. Defendants' Statement of Facts at ¶ 54. Ms. Ciarlone had keys to the front door and apartments. Id. at ¶ 55. There was no discussion of whether the tenants had been notified. Ms. Ciarlone stated "I am asserting

our constitutionally protected rights.” Id. at ¶ 57. Mr. Reinhart testified the search did not need to be conducted at a particular time and that if a tenant does not permit access he can “charge a non-entry” to compel access. Response to Statement of Facts at ¶ 15, 16.

When Ms. Ciarlone refused to permit entry, Sergeant Pentheny called the Berks County District Attorney’s Office to confirm the warrant was valid and could be executed through the use of force. Defendants’ Statement of Facts at ¶ 59. Based on this conversation, it was Sergeant Pentheny’s understanding the administrative search warrant was valid and could be executed through the use of force, if necessary. Id. at ¶ 62. Sergeant Pentheny communicated this understanding to Mr. Reinhart. Id. at ¶ 63. Ms. Ciarlone continued to refuse to grant entry. Id. at ¶ 65.

Mr. Orrs inspected the exterior of the property. Defendants’ Statement of Facts at ¶ 66. Mr. Reinhart again advised Ms. Ciarlone to open the door. Mr. Reinhart then knocked on the door and announced he was with the City of Reading Codes Department and requested that the door be opened. Id. at ¶ 67. Mr. Reinhart told Mr. Orrs to break the door. Id. at ¶ 68. Mr. Orrs struck the door with a sledge hammer six times before the glass broke. Id. at ¶ 69. After the glass broke, Mr. Orrs hit the door four more times before someone suggested he stick his hand in the door and turn the latch. Id.

Ms. Ciarlone refused to unlock the interior doors. Defendants’ Statement of Facts at ¶ 71. Mr. Orrs and Mr. Reinhart knocked and announced their presence at each tenant door. Id. at ¶ 71. They broke the doors. Id. They left a signed copy of the administrative

search warrant in each unit. Id. at ¶ 73. After the officers left, Ms. Ciarlone went into each apartment and removed the search warrants. Id. at ¶ 74. She never gave the tenants a copy of the administrative search warrant or advised the tenants a search warrant had been left for them by the City of Reading. Id. at ¶ 75.

Prior to departing, Mr. Orrs issued Ms. Ciarlone a notice of violation, which required Ms. Ciarlone to, among other items, “repair all entrance doors and all windows at entrance doors.” Response to Statement of Facts at ¶ 42. Ms. Ciarlone testified it was her responsibility to pay for the damage to the doors, not the tenants’ responsibility. See Defendants’ Statement of Facts at ¶ 77.

When Ms. Baez returned home at 8:00 p.m. she had a message on her answering machine from Ms. Ciarlone stating people who work for the City of Reading would be coming to the apartment and Ms. Baez should not let them in. Defendants’ Statement of Facts at ¶ 76.

Karen Organtini, a clerk with the City of Reading Property Maintenance Division, stated Mr. Reinhart made negative comments about Ms. Ciarlone. She could not remember specific comments. Plaintiff’s Statement of Facts at Appendix A at 42. In addition, another employee at the office made comments about Ms. Ciarlone, which Ms. Organtini paraphrased as “we’re going – basically we’re going to get in or we’re going to – because she’s in my areas and I have someone that isn’t happy with her.” Id. at 43. It was unclear whether the person who was unhappy with Ms. Ciarlone was an employee or

a tenant. Ms. Organtini also testified that Mr. Reinhart asked her to schedule Ms. Ciarlone's properties for inspection.¹⁰

II. Standard

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). An dispute is “genuine” when “a reasonable jury could return a verdict for the nonmoving party” based on the evidence in the record. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is “material” when it “might affect the outcome of the suit under the governing law.” Id.

A party seeking summary judgment initially bears responsibility for informing the court of the basis for its motion and identifying those portions of the record that “it believes demonstrate the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial Celotex burden can be met simply

¹⁰ An October 12, 2009 article in the Reading Eagle entitled “Suit Against Reading Codes Inspector Seeks Statement from District Judge” quotes the Honorable Wallace Scott on comments made by Mr. Reinhart that Mr. Reinhart wanted to “get” Ms. Ciarlone. The alleged comments were made when Mr. Reinhart accompanied Code Inspector Joseph Esterly in April 2007 to submit an application for a search warrant to inspect a different property owned by Ms. Ciarlone.

Plaintiffs maintain this statement is admissible through a hearsay exception because Judge Scott is unavailable. The motion to quash the subpoena was granted and the later attempts to subpoena Judge Scott were denied. Defendants maintain this is triple hearsay. Even if Judge Scott's statement is admissible, the article is inadmissible hearsay.

by demonstrating to the district court that “there is an absence of evidence to support the non-moving party’s case.” Id. at 325. After the moving party has met its initial burden, the adverse party’s response must cite “particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials” Fed. R. Civ. P. 56(c)(1). Summary judgment is therefore appropriate when the non-moving party fails to rebut by making a factual showing that is “sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex, 477 U.S. at 322.

Under Rule 56 of the Federal Rules of Civil Procedure, the court must draw “all justifiable inferences” in favor of the non-moving party. Anderson, 477 U.S. at 255. The court must decide “not whether . . . the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.” Id. at 252. If the non-moving party has produced more than a “mere scintilla of evidence” demonstrating a genuine issue of material fact, then the court may not credit the moving party’s “version of events against the opponent, even if the quantity of the [moving party’s] evidence far outweighs that of its opponent.” Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

III. Discussion

A. The Fourth Amendment

Count I of the complaint concerns the October 10, 2008 inspection and search of 511 Oley Street, and claims the failure of the defendants to obtain the consent of the tenants and the use of the sledge hammer to execute the warrant violated the Fourth Amendment.¹¹ Count III alleges a violation of the tenants' right to privacy. First Amended Complaint at ¶¶ 197-204.

To state a section 1983 claim, “a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law.” Harvey v. Plains Twp. Police Dep’t, 421 F.3d 185, 189 (3d Cir. 2005) (quoting West v. Atkins, 487 U.S. 42, 48 (1988)). The Fourth Amendment provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” A “search of private property without proper consent is ‘unreasonable’ unless it has been authorized by a valid search warrant.” Camara v. Mun. Court of City and Cnty. of San Francisco, 387 U.S. 523, 528 (1968). In Camara, the United States Supreme Court held “administrative searches . . . are significant intrusions

¹¹ First Amended Complaint at ¶¶ 137-167, Ciarlone v. City of Reading, No. 09-310 (E.D. Pa. filed Apr. 7, 2009).

upon the interests protected by the Fourth Amendment, . . . such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual.” Camara, 387 U.S. at 534.

1. Probable Cause to Issue an Administrative Search Warrant

Probable cause to issue an administrative search warrant exists “if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling.” Camara, 387 U.S. at 538. Standards for conducting such searches “will vary with the municipal program being enforced, [and] may be based upon the passage of time, the nature of the building (e.g., a multifamily apartment house), or the condition of the entire area.” Id. at 538. A warrant procedure guarantees “a decision to search private property is justified by a reasonable governmental interest.” Id. at 539. Reasonableness is the “ultimate standard.” Id. The Camara court noted “warrants should normally be sought only after entry is refused.” Id.

The City of Reading Property Maintenance Code states “[p]roperties covered under this Code shall be inspected routinely when possible every three (3) years or as part of a planned inspection being conducted pursuant to a systematic or concentrated code enforcement program in that portion of the city.” See Defendant’s Statement of Facts at Exh. 12, at 6. If an “owner, occupant or other person in charge of a structure . . . refuses, impedes, inhibits, interferes with, restrict [sic] or obstructs entry and free access to every

part of the structure or premises where inspection authorized by this Code is sought, the administrative authority shall promptly apply for a search or inspection warrant.” Id. at 7.

Similarly, the City of Reading Housing-Rental Ordinance provides “[a]n inspection of the dwelling unit or rooming unit shall be performed every three (3) years.” See Defendant’s Statement of Facts at Exh. 13 at 10. The Ordinance allows the administrative authority to apply for a search warrant if the “owner, occupant or other person in charge of a structure . . . refuses, impedes, inhibits, interferes with, restrict [sic] or obstructs entry and free access to every part of the structure or premises.” Id. at 12.

The United States Supreme Court in Camara stated:

[M]ost citizens allow inspections of their property without a warrant. Thus, as a practical matter and in light of the Fourth Amendment’s requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry.

387 U.S. at 539-40. The statement that “a warrant should normally be sought only after entry is refused” was dicta and not central to the Court’s holding. Immediately before the quoted portion, the Court stated: “[I]n the case of most routine area inspections, there is no compelling urgency to inspect at a particular time or on a particular day.” Id. at 539.

In addition, the plaintiff in Camara was a tenant. The government had obtained consent from the landlord to search the building but had not obtained the consent of the tenant. The court found the plaintiff, a tenant, “had a constitutional right to insist that the inspectors obtain a warrant to search” Camara, 387 U.S. at 540. The government

did not contend the landlord's consent was sufficient to authorize the inspection of the tenant's premises. Id.

There is a genuine issue of material fact regarding whether the tenants' Fourth Amendment rights and the tenants' right to privacy were violated. The defendants failed to provide notice prior to the planned routine search and prior to executing the search warrant. Regardless whether the Property Maintenance Code and Housing-Rental Ordinance required notice to tenants,¹² the tenants have a right to privacy in their rental homes, Chapman v. United States, 365 U.S. 610, 616-18 (1961). Whether the failure to provide notice prior to the search of their homes was reasonable under the Fourth

¹² The parties dispute whether the Property Maintenance Code and Housing-Rental Ordinance require notice to the tenants. The sections addressing notice of an inspection require notice only to the property owner or representative to the owner. See Defendants' Motion at Exh. 12; Defendants' Motion at Exh. 13 at 12. Notice of a violation must be sent to the person responsible for the violation. Defendants' Motion at Exh. 12 at § 107.1 - 107.2. Official notices must be served on the owner and local responsible agent and must be posted at the dwelling unit or rooming unit. Defendants' Motion at Exh. 13 at 12. In addition, Pennsylvania Rule of Criminal Procedure 207 provides: "an officer executing a search warrant shall, before entry, give, or make reasonable effort to give, notice of the officer's identity, authority, and purposes to any occupant of the premises specified in the warrant, unless exigent circumstances require the officer's immediate forcible entry."

Plaintiffs maintain any interpretation of the codes that would condone not providing notice to a tenant prior to an inspection of his rental home would violate the tenant's right to privacy. See 1 Pa. Cons. Stat. Ann. § 1922 (when ascertaining the intent of the General Assembly, a court must presume "the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth."). Defendants maintain the rules of statutory construction require a reading of the Property Maintenance Code which requires notice of an inspection only by informing the owner or representative of the owner. The other notice sections do not apply to notification of an inspection. If they did, the section addressing notice requirements for inspections would be surplusage. See 1 Pa. Cons. Stat. § 1921(a) (" . . . Every statute shall be construed, if possible, to give effect to all its provisions.").

Amendment is a question for the jury.

b. Material Omission

Defendants contend the failure to advise the judge that the tenants had not been provided notice was not a material omission from the affidavit.

To establish there was a material omission, “the plaintiff must prove, by a preponderance of the evidence, (1) that the affiant knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that create a falsehood in applying for a warrant; and (2) that such statements or omissions are material, or necessary, to the finding of probable cause.” Sherwood v. Mulvihill, 113 F.3d. 396, 399 (3d Cir. 1997).

There is a genuine issue of material fact regarding whether Mr. Orrs “knowingly and deliberately, or with a reckless disregard for the truth,” omitted information concerning the failure to seek consent from the tenants.

There was a sign on the door of 511 Oley Street stating:

To City of Reading: I/we want our constitutionally and charter protected rights! Attempts by you to enter these premises using police tactics are a violation of these rights. If you return with a warrant, you must immediately call 610-334-7875.

Defendant’s Statement of Facts at Exh. 15. Mr. Orrs did not mention this sign in his Affidavit or during his deposition. He testified he did not include a statement concerning whether the tenants consented because Ms. Ciarlone was the person who refused access.

Moreover, a jury could find the omission was “material, or necessary, to the finding of probable cause.” Because Ms. Ciarlone requested the search warrant, it was required to gain access to the building even if the tenants had consented to an inspection of their apartments. Mr. Orrs, however, knew a landlord could not consent on the tenants’ behalf, knew the tenants had a right to grant or deny access, and knew tenants had a constitutional right to object to the inspection. Plaintiff’s Statement of Facts at Appendix G at 53-54.

2. Execution of the Search Warrant

Defendants maintain the use of force did not violate the Fourth Amendment because the damage was only to the locked doors which prevented the execution of the warrant. They argue that Mr. Orrs, not Mr. Reinhart, used a sledge hammer on the door and, therefore, the Fourth Amendment claim against Mr. Reinhart should be dismissed.

The Fourth Amendment’s “general touchstone of reasonableness . . . governs the method of execution of the warrant.” United States v. Ramirez, 523 U.S. 65, 71 (1998). “Excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though entry itself is lawful.” Id.

A genuine issue of material fact exists regarding whether the use of force to execute a warrant issued to conduct a routine property inspection was reasonable where the tenants did not have notice of the inspection and there were less destructive means

available to gain access to the property. Mr. Orrs and Mr. Reinhart failed to even contact the tenants to determine whether they would consent to a search of the apartments before using force to gain access. In addition, the defendants could have used monetary fines or a locksmith to gain access to the property instead of force when Ms. Ciarlone refused to grant access. An issue of fact exists as to whether Mr. Orrs used excessive force, and an issue of fact remains as to whether Mr. Reinhart is liable because he made the decision to use the sledge hammer.¹³

B. Substantive Due Process Rights

The fourth cause of action alleges violations of the plaintiffs' Fourteenth Amendment substantive due process rights. It alleges the selection of Ms. Ciarlone's property for inspection and the use of a sledge hammer on only Ms. Ciarlone's property violated her substantive due process rights.

The United States Supreme Court has held that because the Fourth Amendment "provides an explicit textual source of constitutional protection against . . . physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." Graham v.

¹³ Defendants also maintain the tenants cannot state a claim based on the execution of the search warrant because Ms. Ciarlone paid for the damage to the door. Defendants cite no law to support this argument and plaintiffs make no argument regarding this claim. The complaint not only seeks compensatory damages, it also seeks nominal damages, reasonable costs of suit, attorneys' fees, and punitive damages.

Connor, 490 U.S. 386, 395 (1989). “Challenges to the reasonableness of a search by government agents clearly fall under the Fourth Amendment, and not the Fourteenth.”
Conn v. Gabbert, 526 U.S. 286, 293 (1999).

Plaintiffs maintain the claim does not challenge the execution of the search. Rather, the Fourteenth Amendment claim challenges the selection of Ms. Ciarlone’s property and the use of a sledge hammer on only Ms. Ciarlone’s property as violations of the Fourteenth Amendment.¹⁴ Because plaintiffs claim is that the use of force on only Ms. Ciarlone’s property violated her due process rights, it is distinct from the Fourth Amendment excessive force claim.

“‘[T]he core of the concept’ of due process is ‘protection against arbitrary action’ and . . . ‘only the most egregious official conduct can be said to be arbitrary in the constitutional sense.’” United States Theatre Circuit, Inc. v. Twp. of Warrington, PA, 316 F.3d 392, 399 (3d Cir. 2003) (quoting Cnty. of Sacramento v. Lewis, 523 U.S. 833, 846 (1998)). “The exact degree of wrongfulness necessary to reach the conscience-shocking level depends upon the circumstances of a particular case.” Sanford v. Stiles, 456 F.3d 298, 306 (3d Cir. 2006) (quoting Miller v. City of Phila., 174 F.3d 368, 375 (3d Cir. 1999)).

511 Oley Street was to be searched pursuant to the Property Maintenance Code and

¹⁴ To distinguish this claim from the Fourth Amendment claim, the plaintiffs state “[t]he novelty of the use of force in executing a planned routine inspection reveals the disparate treatment to which the Plaintiffs were subjected to in this case.” Plaintiffs' Memorandum at 18.

the Housing-Rental Ordinance. After Ms. Ciarlone requested a search warrant, Mr. Orrs obtained a warrant. The defendants asked Ms. Ciarlone to open the doors to the property numerous times, spoke with a district attorney prior to using force, and used force only to gain entry. In addition, no other owner refused to allow the inspectors into the property after a warrant had issued.

Ms. Ciarlone, however, presents evidence Mr. Reinhart requested her property be searched and argues both the plaintiff expert and the defendant expert testified that no model code provision or requirement would sanction the use of a sledge hammer to conduct a planned routine inspection. In addition, the defendants had time to deliberate and contemplate the decision to use a sledge hammer and it was not an exigent circumstance. After force was used on Ms. Ciarlone's property, the Council of the City of Reading passed Resolution 107-2008, which provided: "[T]he Codes Department is not to undertake any forced entry inspections of private properties until a standard operating procedure is reviewed and/or developed and approved. . . ."

Ms. Ciarlone establishes a question of fact regarding whether the use of a sledge hammer on her property "shock[s] the conscience." Because Mr. Orrs and Mr. Reinhart had time to contemplate the use of force and its alternatives, a jury could find the actions are "egregious official conduct" that are "arbitrary in the constitutional sense." See United States Theatre Circuit, Inc., 316 F.3d at 399.

C. Retaliation

Ms. Ciarlone alleges the defendants violated her First Amendment right to be free from retaliation. To establish a First Amendment retaliation claim, a plaintiff must prove the following elements: “(1) constitutionally protected conduct, (2) retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights, and (3) a causal link between the constitutionally protected conduct and the retaliatory action.” Thomas v. Independence Twp., 463 F.3d 285, 296 (3d Cir. 2006) (citing Mitchell v. Horn, 318 F.3d 523, 530 (3d Cir. 2003)).

1. Inspector Orrs

Before the inspection, Ms. Ciarlone had never met, or heard of, Mr. Orrs. Ms. Ciarlone testified at her deposition that she did not believe Mr. Orrs harbored animosity toward her because she was a member of the Centre Park Historic District, a member of the City of Reading Historic and Architectural Review Board, or a member of the Real Estate Investors Association. See Defendants’ Motion at Exh. 1 at 240-249. In addition, Mr. Orrs testified he did not know Ms. Ciarlone prior to the search of her property. Defendants’ Motion at Exh. 6 at 45:9-12.

Ms. Ciarlone argues Mr. Orrs retaliated against her because she filed a complaint with the Home Rule Charter Review Board against Jatinder Khokhar, the former department manager of the Office of Code Services. This complaint was filed in

December 2007. Ms. Ciarlone also maintains the evidence establishes “a general knowledge and animosity harbored” against her “by all employees and officials in charge of code enforcement in the City of Reading.” Response to Statement of Facts at ¶¶ 123, 125.

Ms. Ciarlone failed to present sufficient evidence to raise a genuine issue of material fact regarding whether Mr. Orrs retaliated against her because of protected conduct. Ms. Ciarlone fails to establish Mr. Orrs knew who she was, let alone that he was aware of protected conducted she participated in and retaliated against her due to her participation.

2. Administrator Reinhart

Ms. Ciarlone testified at her deposition that she did not believe Mr. Reinhart harbored animosity toward her because she was a member of the Centre Park Historic District or because she was a member of the City of Reading Historic and Architectural Review Board. See Defendants’ Motion at Exh. 1 at 240-245. Ms. Ciarlone testified she did not know whether Mr. Reinhart harbored animosity toward her because she was a member of the Real Estate Investors Association. Id. at Exh. 1 at 246. She stated “[h]e may have animosity toward the organization, but me individually as a member of the organization, probably no.” Id. She believes he may harbor animosity toward the organization because “individuals within the organization have utilized tools in the

charter that were about things that City Hall had done.” Id. Ms. Ciarlone again relies on the complaint she filed against Mr. Khokhar in December 2007 and the “general knowledge and animosity” harbored against her by code enforcement personnel.

Ms. Ciarlone relies on the deposition testimony of Karen Organtini, an office worker at the City of Reading Property Maintenance Division. Ms. Organtini stated Mr. Reinhart had made negative comments about Ms. Ciarlone, see Plaintiff’s Motion at Exh. 12 at 44, and another employee at the office made comments about Ms. Ciarlone, which Ms. Organtini paraphrased as “we’re going – basically we’re going to get in or we’re going to – because she’s in my areas and I have someone that isn’t happy with her.” Id. at 43. Ms. Organtini testified that Mr. Reinhart asked her to schedule all of Ms. Ciarlone’s properties for inspection. Id. at 29-33. Ms. Organtini also testified that 511 Oley Street was to be scheduled for inspection pursuant to the computer generated list and all of Ms. Ciarlone’s properties were not scheduled for inspection.¹⁵

Ms. Ciarlone fails to establish a retaliation claim against Mr. Reinhart. Ms. Ciarlone fails to establish a jury could find Mr. Reinhart retaliated against her because of

¹⁵ Ms. Ciarlone also relies on the statement by Judge Scott in the Reading Eagle that, when applying for a search warrant on a different property in April 2007, Mr. Reinhart stated “I can’t wait to get back at that b*****.” Judge Scott’s motion to quash the subpoena for his deposition and testimony was granted, and plaintiffs’ later attempts to subpoena Judge Scott were denied. In addition, the plaintiffs’ motion for interlocutory appeal was denied.

Plaintiffs maintain this statement is admissible through a hearsay exception because Judge Scott is unavailable. Defendants maintain, even if Judge Scott is unavailable, the newspaper article also is a hearsay statement and does not satisfy any hearsay exception. Even if Judge Scott’s statement was considered, Ms. Ciarlone fails to establish the comment was connected to any protected activity.

any protected conduct. She fails to provide any evidence to connect the negative comments to protected conduct.

D. Failure to Educate and Train

Plaintiffs allege a failure to educate and train claim against Mr. Reinhart. A plaintiff alleging a failure to train claim must show “the failure amounts to ‘deliberate indifference’ to the rights of persons with whom those employees will come into contact.” Carter v. City of Phila., 181 F.3d 339, 357 (3d Cir. 1999) (citing City of Canton v. Harris, 489 U.S. 378, 388 (1989)). The “failure to train may amount to deliberate indifference where the need for more or different training is obvious, and inadequacy very likely to result in violation of constitutional rights.” Id.

Ms. Ciarlone fails to establish a jury could determine Mr. Reinhart is liable for the failure to train. She fails to establish he was deliberately indifferent. She presents no evidence the need for additional training was obvious or that inadequate training likely would result in a violation of constitutional rights. Ms. Ciarlone has come forward with no evidence one way or the other of a failure to train. She certainly can point to no facts that suggest any failure to train caused her harm.

E. Qualified Immunity

Qualified immunity shields government officials performing discretionary

functions from liability for civil damages unless their conduct violates clearly established statutory or constitutional rights known to a reasonable person. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Courts apply a two-step inquiry to determine whether a defendant is entitled to qualified immunity. First, a court must determine whether a constitutional right was violated. Second, a court must determine whether the right was clearly established such that a reasonable officer would have known the conduct violated their rights. Saucier v. Katz, 533 U.S. 194, 201-02 (2001). In Pearson v. Callahan, 555 U.S. 223, 129 S.Ct. 808, 818 (2009), the Supreme Court found a court may address whether a right was clearly established before addressing whether a constitutional right was violated.

1. Probable Cause

Defendants maintain, if notice to a tenant was a constitutional requirement, the requirement was not clearly established as of October 10, 2008. The language in Camara stating “it seems likely that warrants should normally be sought only after entry is refused” is dicta and the Property Maintenance Code required notice be provided to only the landlord. Defendants also maintain Mr. Orrs consulted with a district attorney in preparing the application for a search warrant.

In Kelly v. Borough of Carlisle, 622 F.3d 248, 255-56 (3d Cir. 2010), the United States Court of Appeals for the Third Circuit found if a police officer “relies in good faith

on a prosecutor's legal opinion," he is "presumptively entitled to qualified immunity from Fourth Amendment claims premised on a lack of probable cause." The reliance, however "must itself be objectively reasonable . . . because 'a wave of the prosecutor's wand cannot magically transform an unreasonable probable cause determination into a reasonable one.'" Kelly, 622 F.3d at 256 (quoting Cox v. Hainey, 391 F.3d 25, 34 (1st Cir. 2004)). To rebut this presumption, the plaintiff must show "that, under all the factual and legal circumstances surrounding the arrest, a reasonable officer would not have relied on the prosecutor's advice." Id.

The advice of the assistant city solicitor creates a presumption the action was reasonable. It is unclear, however, whether the assistant city solicitor was aware the tenants were not notified of the inspection or provided an opportunity to open their doors for the inspector. In addition, the plaintiffs present evidence that the inspectors, officers and officials involved understood the tenants had a right to privacy in their apartments. The plaintiffs establish a genuine issue of material fact concerning whether a reasonable officer would have believed a warrant obtained to search an apartment was valid if the tenants had not been provided with notice of the search and whether a reasonable officer would have relied on the attorney's advice.

2. Execution of the Search Warrant

There is no requirement that a search warrant "must include a specification of the

precise manner in which they are to be executed.” Dalia v. United States, 441 U.S. 238, 257 (1979). “[I]t is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant – subject of course to the general Fourth Amendment protection ‘against unreasonable searches and seizures.’” Id.

A genuine issue of material fact exists regarding whether the use of the sledge hammer was objectively reasonable and whether a reasonable officer would have relied on the attorney’s advice. Sergeant Pentheny spoke with an assistant district attorney prior to defendants’ use of force, and the only damage was to the doors which prevented them from executing the warrant, but Mr. Orrs and Mr. Reinhart failed to contact the tenants prior to using force on the tenant doors to execute the warrant and used a sledge hammer to gain access to the property and apartments.

IV. Conclusion

I will deny the motion for summary judgment for the tenants’ Fourth Amendment claim, the right to privacy claim, Ms. Ciarlone’s Fourth Amendment claim, Ms. Ciarlone’s Fourteenth Amendment due process claim and the claim for qualified immunity. I will grant the motion for summary judgment for the First Amendment retaliation claim.

An appropriate order follows.

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

MARY ANN CIARLONE, et al.	:	Civil Case
Plaintiffs,	:	
	:	
v.	:	No. 09-310
	:	
CITY OF READING, et al.	:	
Defendants,	:	

ORDER

AND NOW, this 20th day of January, 2011, upon consideration of defendants, Brad Reinhart, James Orrs, and the City of Reading’s motion for summary judgment (Doc. # 79), and all responses and replies thereto, **IT IS HEREBY ORDERED** that:

1. The motion is **GRANTED** in part and denied in part;
2. The motion is **DENIED** as to plaintiffs’ Fourth Amendment claim;
3. The motion is **DENIED** as to plaintiffs’ violation of privacy claim;
4. The motion is **DENIED** as to plaintiffs’ Fourteenth Amendment claim;
5. The motion is **GRANTED** as to plaintiffs’ First Amendment retaliation claim;
6. The motion is **GRANTED** as to plaintiffs’ failure to train claim; and
7. The motion is **DENIED** as to defendants’ claim for qualified immunity.

BY THE COURT:

/s/ LAWRENCE F. STENGEL

LAWRENCE F. STENGEL, J.