UNITED STATES DISTRICT COURT
District of New Jersey

CHAMBERS OF
JOSE L. LINARES
JUDGE

MARTIN LUTHER KING JR.
FEDERAL BUILDING & U.S. COURTHOUSE
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March 17, 2005

LETTER ORDER & OPINION

Pamela Perkins
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Re: Perkins, et al. v. Sebring Assocs., et al.
Civil Action No. 04-CV-2008 (JLL)

Dear Counsel:

Introduction

This matter is before the Court on defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). The Court has considered the submissions in support of and in opposition to the motion. There was no oral argument. See Fed. R. Civ. P. 78.

Background

Plaintiff filed this action on or about April 29, 2004.[1] She alleges that, on May 3, 2002,

[1]Pamela Perkins brings this action along with her purported roommate, Bryant Young; however, because the facts alleged in the Complaint that are relevant to this motion involve only Ms. Perkins, the Court, for ease of description, will refer only to Ms. Perkins, whom it will call "plaintiff."

several police officers arrived at her apartment building in Hackensack, New Jersey. (Compl. ¶ 2.) These officers, she alleges, were wearing plainclothes and did not have a search warrant. (Id.) They also did not identify themselves to the individual at the front desk, Mr. Frank Cook. (Id. ¶ 3.) Plaintiff contends that the officers showed Mr. Cook a photograph of a fugitive named Kevin Saxon. (Id.) When Mr. Cook told the officers he did not recognize Mr. Saxon, plaintiff alleges, the officers "rushed upstairs via the stairwell and elevator" to her apartment. (Id. ¶ 4.) As the officers made their way to her apartment, plaintiff claims that one officer remained at the front desk to ensure that Mr. Cook would not alert her to the officers' arrival. (Id. ¶ 6.) Plaintiff avers that a female officer soon thereafter knocked on her door. (Id. ¶ 7.) Plaintiff, "[a]fter looking through the peephole," inquired who was knocking, and the female officer allegedly replied: "Can I talk to you?" (Id.) When plaintiff opened the door, she alleges, the officers rushed in and informed her that she was under arrest. (Id. ¶ 9.) Plaintiff submits she was then assaulted, maced, and taken into custody. (Id. ¶¶ 10-11.) The remainder of plaintiff's Complaint involves judicial process and the like and is not relevant to this motion.

Plaintiff has sued only the apartment building, "Sebring Associates/The Excelsior II," and the building's owner, "Anthony/Scott Palmeri." Defendants now move to dismiss under Rule 12(b)(6).

Discussion

Plaintiff is proceeding pro se. As a result, this Court holds her pleading to "less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520-21 (1972). Plaintiff alleges Fourth Amendment and "civil rights" violations, and the Court construes these as claims under 42 U.S.C. § 1983.[2] For the following reasons, and notwithstanding the more relaxed pro se pleading standards, plaintiff fails to state a cause of action under § 1983.

First, claims under § 1983 require state action. Lugar v. Edmondson Oil Co., 457 U.S. 922, 929 (1982). For this reason, meritorious § 1983 claims against private citizens are exceedingly rare. The few reported cases that have addressed such claims have without exception held that conspiratorial behavior, concerted activity, or extensive cooperation between the private and state actors is required by the statute. See Destek Group, Inc. v. Pub. Util. Comm'n, 318 F.3d 32, 39-40 (1st Cir. 2003) (upholding dismissal of § 1983 claims against

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[2]Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or 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.

private corporation that had entered into agreement with state university to provide cell phone service in supposed violation of plaintiff's competitive rights, because conduct was not "fairly attributable to the State"); Rodriques v. Furtado, 950 F.2d 805, 813-15 (1st Cir. 1991) (holding that doctor who performed vaginal search of plaintiff pursuant to a search warrant was state actor, but that doctor had qualified immunity); Moore v. Marketplace Rest., Inc., 754 F.2d 1336, 1352-53 (7th Cir. 1985) (upholding dismissal of § 1983 claim against restaurant owner who had allegedly "fingered" patrons for deputies to arrest, because plaintiff failed to present sufficient evidence "of some concerted effort or plan" between the owner and the state actors); Temple v. Albert, 719 F. Supp. 265, 267 (S.D.N.Y. 1989) (denying motion by doctor to dismiss § 1983 complaint, because plaintiff alleged a conspiracy between the doctor and arresting officers to deny plaintiff medical treatment); Preston v. Rossi, 1986 U.S. Dist. LEXIS 18141, at *1 (E.D. Pa. Nov. 4, 1986) (dismissing § 1983 claim against private actor for failure to allege that robbery was conducted "in concert with public officials"). Here, plaintiff's Complaint fails to allege conduct on defendants' part that is sufficiently intertwined with the conduct of the officers. To the contrary, she alleges only that Mr. Cook failed to prevent the officers from "rushing" past his desk, and that he was then held at bay so that he would not call plaintiff's apartment from his telephone. (Compl. ¶¶ 4, 6.) Moreover, plaintiff claims that the officers did not even identify themselves as such (id. ¶ 3), a fact which, while perhaps supporting a claim for breach of common law duty, in that Mr. Cook allowed strange civilians past the front desk, would appear to foreclose the possibility of a conspiracy between Mr. Cook and state actors.

Second, and closely related to the previous point, there is an important action-inaction problem at issue here. Section 1983 claims based upon the inaction of a defendant are extraordinarily difficult to sustain. Indeed, even state actors, the intended subjects of the statute, cannot be held liable under § 1983 for failure to act unless they somehow create the peril from which the plaintiff requires rescue. See DeShaney v. Winnebago County, 489 U.S. 189, 196-203 (1989). Here, plaintiff's implicit theory of § 1983 liability flips DeShaney on its head by imposing an affirmative duty upon private actors to protect others from the (seemingly) illegal encroachments of the state. The absurdity of such a ruling is underscored by the fact that Mr. Cook was, by plaintiff's own version of the facts, forbidden by the police to warn plaintiff of their impending arrival. (Compl. ¶ 6.) Were such conduct sufficient to give rise to § 1983 liability, every private person within the jurisdictional reach of the district courts would be duty-bound to interfere in police business when that business appears legally questionable – this Court refuses to (in effect) deputize an army of private internal affairs officers.

Third, there is virtually no nexus between Mr. Cook and the actual alleged violations of the Fourth Amendment. Plaintiff's § 1983 allegations appear to constitute false arrest, excessive force, and malicious prosecution claims. All the alleged facts relevant to these claims, however, occurred after (1) the female officer knocked on plaintiff's door, (2) plaintiff looked through her peephole and asked who it was, (3) the female officer asked to speak with plaintiff, and (4) plaintiff voluntarily opened her door. (Id. ¶¶ 7-9.) The only plausible theory enveloping Mr. Cook in the alleged abuse that followed is that, by failing to obstruct the entry of up to twenty police officers into the inner corridors of the apartment building (id. ¶ 2), he created an

environment wherein it was easier for the officers to coax plaintiff into willingly opening her door for them. (See id. ¶ 8 (alleging that plaintiff "assumed that the woman at her door was a neighbor because she did not receive a telephone call from the Front/Security Desk").) This is an incredibly tenuous basis for liability. Had Mr. Cook actively participated in a subterfuge to enable the officers to gain entry, or had he used a master key to open plaintiff's door, plaintiff's theory would gain some strength. But under the facts alleged, § 1983 liability would be patently unfair.

Fourth, Mr. Cook himself is not even a named defendant in this action. Plaintiff has sued only the building and its owner. If a municipality cannot be held vicariously liable for the constitutional torts of its agents, Monell v. Dep't of Soc. Servs., 436 U.S. 658, 695-95 (1978), it follows with even greater force that a private actor cannot be held so liable. This reasoning is supported by the plain language of the statute, which requires participation by the named defendant. See 42 U.S.C. § 1983 ("Every person who ... subjects, or causes to be subjected, any citizen ... to the deprivation of any rights ... secured by the Constitution and laws, shall be liable to the party injured ... ."). There being no allegation in the Complaint that Sebring Associates or Mr. Palmeri had any involvement in the events of May 23, 2002, plaintiff's § 1983 must fail.

Conclusion

For the reasons set forth herein, defendants' motion to dismiss plaintiff's federal claims is GRANTED. The Court declines to exercise supplemental jurisdiction over the remaining State claims. 28 U.S.C. § 1367(c)(3). The relevant limitations periods for these claims are tolled for forty-five (45) days within which time plaintiff is permitted to re-file these in State Court. See Clark v. Buchko, 936 F. Supp. 212, 223 (D.N.J. 1996) (citing Galligan v. Westfield Ctr. Serv., Inc., 82 N.J. 188 (1980)). This action is dismissed.

SO ORDERED.

/s/ Jose L. Linares
United States District Judge