IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

Civil Action No. 18-cv-00217-REB-KLM

WILLIAM MONTGOMERY,

Plaintiff,

v.

MATTHEW CHERNAK,
MIKE HOWARD, and
MATTHEW BROUGH,

Defendants.

ORDER OVERRULING OBJECTIONS TO AND ADOPTING RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Blackburn, J.

The matters before me are: (1) the **Defendants' Motion To Dismiss** [#17][1] filed May 9, 2018; and (2) the related **Recommendation of United States Magistrate Judge** [#43] filed February 28, 2019. The plaintiff filed an objection [#47] to the recommendation, and the defendants filed a response [#49] to the objection. I overrule plaintiff's objections, approve and adopt the recommendation, and grant the defendants' motion to dismiss.

As required by 28 U.S.C. § 636(b), I have reviewed *de novo* all portions of the recommendation to which objections have been filed. I have considered carefully the recommendation; plaintiff's objections and defendants' response thereto; the underlying motion, response, and reply; the complaint to which the motion is directed; and all applicable caselaw.

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[1] "[#17]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's case management and electronic case filing system (CM/ECF). I use this convention throughout this order.

The recommendation is exquisitely detailed and exceptionally well-reasoned. So thoroughly and cogently has the magistrate judge considered and analyzed the issues raised by and inherent to the motion that any overly extended exegesis on my part would be little more than a festooned reiteration of her excellent work. Considering plaintiff's specific objections, they are without merit.

Plaintiff alleges claims in this lawsuit for retaliatory arrest and retaliatory prosecution in violation of the First Amendment and for false arrest and malicious prosecution in violation of the Fourth Amendment. At base, the validity *vel non* of all these claims hinges on whether the defendant officers had probable cause to arrest plaintiff. ***See Reichle v. Howards***, 566 U.S. 658, 664-65, 132 S.Ct. 2088, 2093, 182 L.Ed.2d 985 (2012) ("This Court has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause[.]");[2] ***Hartman v. Moore***, 547 U.S. 250, 265-66, 126 S.Ct. 1695, 1707, 164 L.Ed.2d 441 (2006) (First Amendment claim for retaliatory prosecution not viable if officers had probable cause to arrest); ***Atwater v. City of Lago Vista***, 532 U.S. 318, 354, 121 S.Ct. 1536, 1557, 149 L.Ed.2d 549 (2001) (Fourth Amendment claim for unconstitutional arrest will not lie where officers had probable cause); ***Barton v. City and County of Denver***, 432 F.Supp.2d 1178, 1206-07 (D. Colo. 2006) (malicious prosecution claim under Fourth Amendment, requires proof, *inter alia*, that officer's affidavit made without probable cause), ***aff'd***, 2007 WL 3104909 (10th Cir. Oct. 24, 2007). Although plaintiff maintains the magistrate judge erred in determining this issue as a matter of law, probable cause is a jury question only "if there room for a difference of opinion" as to the

[2] I discuss the effect of this decision on plaintiff's First Amendment retaliatory arrest claim in more depth *infra*.

reasonableness of the officers' actions. ***DeLoach v. Bevers***, 922 F.2d 618, 623 (10th Cir. 1990), ***cert. denied***, 112 S.Ct. 65 (1991) (citation and internal quotation marks omitted). ***See also Keylon v. City of Albuquerque***, 535 F.3d 1210, 1215 (10th Cir. 2008) (court should decide issue of probable cause "when there is no genuine issue of material fact"). Such is not the case here.

Plaintiff maintains the officers lacked probable cause because they failed to adequately investigate whether he in fact was trespassing prior to arresting him. More particularly, he complains the officers failed to give adequate consideration to his protestations that the area to which he had removed himself, although fenced in, was public property, or to the copies of official emails he produced attesting to that fact. Yet while "officers are charged with knowledge of any readily available exculpatory evidence that they unreasonably fail to ascertain," ***Maresca v. Bernalillo County***, 804 F.3d 1301, 1310 (10th Cir. 2015), ***cert. denied***, 136 S.Ct. 2509 (2016) (citation and internal quotation marks omitted), they are most certainly not required to credit a suspect's potentially self-interested protestations of innocence, ***see Romero v. Fay***, 45 F.3d 1472, 1478 & n.3 (10th Cir. 1995).

Nor can I find the officers' failure to credit the emails plaintiff produced negated probable cause. Although plaintiff suggests the officers could have attempted to contact the officials who provided him these documents, he neglects to point out that his encounter with the officers occurred after midnight.[3] No conception of reasonableness

[3] Although this fact is not pled in the Amended Complaint, it is substantiated by the arresting officer's affidavit. (***See* Motion App.**, Exh. 1 at 2.) Because the affidavit is referenced in the Amended Complaint and underlies plaintiff's claim for malicious prosecution, I find it appropriate to consider that document here. ***See Alvarado v. KOB-TV, L.L.C.***, 493 F.3d 1210, 1215 (10th Cir. 2007). Even if this were not the case, however, I would not allow plaintiff to avoid dismissal simply by expediently opting to omit salient facts from his complaint. Courts justifiably have refused to permit such pleading gamesmanship to defeat an otherwise proper motion to dismiss. ***See Nance v. NBCUniversal Media***, LLC, 2018 WL 1762440, at *5 (N.D. Ill. April 12, 2018) ("Having seen Defendants' Motions, Plaintiff simply

required the officers to await the start of the next business day to be credited with an adequate pre-arrest investigation. Nor can I concur with plaintiff's assertion that the fact he was able to produce the documents contemporaneously suggests they were authentic. Although plaintiff could not have fabricated the emails on the spot, it would not be unreasonable to question whether he or someone else had done so earlier, or to what purpose.

I concur further with the magistrate judge that it "strains plausibility" to conclude from the allegations of the Amended Complaint that defendants had prior knowledge of the public nature of the enclosed plaza. (***See* Recommendation** at 21-22.) Although the Amended Complaint alleges the plaza was well-known to "officers of the Fort Collins Police Department" based on their regular patrols of the area (***see* Am. Compl. ¶¶** 21-22 at 5), that allegation is woefully short of supporting an inference that these specific defendants had such knowledge. ***See Robbins v. State of Oklahoma***, 519 F.3d 1242, 1250 (10th Cir. 2008). Moreover, whatever defendants knew about the nature of the plaza prior to that time, the construction of a fence around it gave the reasonable impression the area was no longer open to the public.

Thus, I find no error in the magistrate judge's conclusion that defendants had probable cause to arrest plaintiff for trespassing. Because plaintiff's arrest on that basis was righteous, it is irrelevant whether probable cause existed as to the other crimes for which he was arrested. ***Kilgore v. City of Stroud***, 158 Fed. Appx. 944, 948 (10th Cir. Nov. 29, 2005); ***Marrs v. Boles***, 51 F.Supp.2d 1127, 1135 (D. Kan. 1998), ***aff'd***, 176

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changes his story. . . . Such earnest gamesmanship is not in the interests of justice and will not be allowed."); ***Aasen v. DRM, Inc***., 2010 WL 2698296 at *2 (N.D. Ill. July 8, 2010) (considering allegations of original complaint omitted from amended complaint where amendment "reflect[ed] an intentional manipulation to avoid the consequences of defendants' appropriate motion to dismiss"); ***Whitehouse v. Piazza***, 397 F.Supp.2d 935, 941 (N.D. Ill. 2005) (court may refer back to original complaint "in the interest of justice").

F.3d 488 (10th Cir. 1999).

Finally, I find plaintiff's arguments regarding the ongoing validity of the Tenth Circuit's decision in ***Howards v. McLaughlin***, 634 F.3d 1131 (10th Cir. 2011), ***overruled by Reichle v. Howards***, 566 U.S. 658, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012), no more convincing than did the magistrate judge. I will not regurgitate her fine exegesis on that issue here. (***See* Recommendation** at 14-18.) Suffice to say that plaintiff's theory regarding this precedent, while novel, is wholly unpersuasive. Although plaintiff argues the clearly established weight of authority from other circuits recognizes a First Amendment claim for retaliatory arrest even where the arrest is supported by probable cause, all but one of the cases he cites pre-date the Supreme Court's decision in ***Reichle***.[4] (***See* Objection** at 14.) The ***Reichle*** Court itself noted it had "never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause," ***Reichle***, 132 S.Ct. at 2093, and subsequent Tenth Circuit decisions have confirmed the issue remains unsettled, ***see Wilson v. Village of Los Lunas***, 572 Fed. Appx. 635, 643 (10th Cir. July 22, 2104); ***Moral v. Hagen***, 563 Fed. Appx. 839, 840 (10th Cir. Jan. 31, 2014). ***See also Pompeo v. Board of Regents of the University of New Mexico***, 852 F.3d 973, 987 (10th Cir. 2017) (questioning whether other aspects of ***Howards*** remain viable in light of ***Reichle***).

Accordingly, I concur with the magistrate judge's recommendation that defendants are entitled to qualified immunity from all claims pled in this lawsuit. Thus, I

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[4] The sole post-***Reichle*** decision comes from a district court in Arizona***. See Donahoe v. Arpaio***, 986 F.Supp.2d 1091 (D. Ariz. 2013). The court there declined to "unravel the tangle of Ninth Circuit and Supreme Court precedents on probable cause in First Amendment retaliation claims," noting instead that genuine disputes of material fact would allow a reasonable jury to conclude on the facts of that case that probable cause was lacking for the arrest. ***Id.*** at 1137. Nevertheless, the court did note in passing that, following ***Reichle***, the Ninth Circuit granted a motion for qualified immunity where the arrest was supported by probable cause. ***Id.*** at 1136-37 (citing ***Acosta v. City of Costa Mesa***, 718 F.3d 800, 825 (9th Cir. 2013)).

will grant defendants' motion to dismiss and dismiss plaintiff's claims with prejudice.

THEREFORE, IT IS ORDERED as follows:

1. That the objections stated in plaintiff's **Objection to the Magistrate Judge's Recommendation** [#47], filed March 18, 2019, are overruled;

2. That the **Recommendation of United States Magistrate Judge** [#43], filed February 28, 2019, is approved and adopted as an order of this court;

3. That **Defendants' Motion To Dismiss** [#17], filed May 9, 2018, is granted;

4. That plaintiff's claims are dismissed with prejudice;

5. That judgment with prejudice shall enter on behalf of defendants, Matthew Chernak; Mike Howard; and Matthew Brough, and against plaintiff, William Montgomery, on all claims for relief and causes of action asserted herein;

6. That the combined Final Pretrial Conference and Trial Preparation Conference scheduled for June 26, 2019, at 1:30 p.m. is vacated;

7. That the jury trial set to commence on July 29, 2019, is vacated; and

8. That defendants are awarded their costs to be taxed by the clerk of the court pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1.

Dated March 26, 2019, at Denver, Colorado.

BY THE COURT:

Robert E. Blackburn
United States District Judge