IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-00901-WJM-NRN

MICHAELLA LYNN SURAT,

Plaintiff,

v.

RANDALL KLAMSER in his individual capacity, and
CITY OF FORT COLLINS, a municipality,

Defendants.

DEFENDANTS' MOTION TO DISMISS

Defendants RANDALL KLAMSER, in his individual capacity, and CITY OF FORT COLLINS, a municipality, by and through their attorneys, Hall & Evans, L.L.C., submit the following Motion to Dismiss, as follows:

CERTIFICATE OF CONFERRAL

Pursuant to this Court's Practice Standard (WJM Practice Standard III.D.1), the undersigned counsel conferred with counsel for Plaintiff by identifying the grounds for dismissal argued herein. Plaintiff does not agree with the underlying legal arguments below and objects to the request for dismissal.

STANDARD OF REVIEW

To state a claim for relief, a Federal complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. ***Robbins v. Okla. Ex rel. Dep't***

of Human Servs., 519 F.3d 1242 (10th Cir. 2008). A FED R. CIV. P. 12(b)(6) motion to dismiss is properly granted when a complaint provides no "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action. … Factual allegations must be enough to raise a right to relief above the speculative level." ***Bell Atl. Corp. v. Twombly***, 550 U.S. 544, 545, (2007). A complaint must be dismissed pursuant to Rule 12(b)(6) for failure to state a claim if it does not plead "enough facts to state a claim to relief that is plausible on its face." ***Id.*** at 570. "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." ***Id.***

At the pleading stage, it is not the defendant's or the Court's responsibility to guess at plaintiff's claims. ***Id***. The court may not assume that a plaintiff can prove facts that the plaintiff has not alleged or that the defendants have violated the laws in ways that the plaintiff has not alleged. Plaintiff must explain what each defendant did to him, when the defendant did it, how the defendant's action harmed him, and what specific legal right the defendant violated. ***Nasious v. Two Unknown B.I.C.E. Agents***, 492 F.3d 1158, 1163 (10th Cir. 2007).

Moreover, the Tenth Circuit has held that request for dismissal brought under ***Heck v. Humphry***, 512 U.S. 477, 486-87 (1994) should be raised as a failure to state a claim pursuant to FED. R. CIV. P. 12(b)(6), as opposed to a lack of subject matter jurisdiction under Rule 12(b)(1). ***Mendia v. City of Wellington***, 432 Fed. Appx. 796, n.1 (10th Cir. 2011).

SUMMARY OF COMPLAINT'S ALLEGATIONS[1]

Plaintiff alleges police were called to a bar after her boyfriend was asked by staff to leave following an altercation. [ECF 1, ¶15-16.] Plaintiff grabbed her boyfriend's arm and tried to pull him away as he was speaking with Fort Colling Police Officer Garrett Pastor, at which point she alleges Fort Colling Police Officer Randall Klamser said her boyfriend was not free to go, but she "can keep walking." [*Id*., ¶18.] Plaintiff alleges Officer Klamser told her to "back off," while pushing her shoulder backwards with his hand, and then grabbed her wrist. [*Id*., ¶19, 21.] She told him, "'you don't need to fucking touch me,' and attempted to free herself from his grasp[,]" and he pulled her arm behind her back and advised that she was under arrest. [*Id*., ¶18.] Plaintiff alleges Officer Klamser held her arm in a rear wristlock hold as Plaintiff alleges the two continued "speaking over one another," and that Officer Klamser then pulled her arm and "forcefully threw her face-down to the ground," causing her injury. [*Id*., ¶22-24, 26-27.] According to the Complaint, "[t]he entire encounter between Ms. Surat and Defendant Klamser happened in thirty-two seconds." [*Id*., ¶28.]

The Complaint states a five-day jury trial was held related to Plaintiff's criminal charges, following which she was convicted of C.R.S. § 18-8-103 (Resisting Arrest) and C.R.S. § 18-8-104(1)(a) (Obstructing a Peace Officer). [*Id*., ¶37.]

[1] For this motion only, Plaintiff's allegations are accepted as true. Defendants reserve the right to dispute each factual allegation contained in the Complaint in any future proceedings.

ARGUMENT

I. Plaintiff's Excessive Force Claim is Barred Based Upon Her Underlying Convictions

Plaintiff's excessive force claim is barred by ***Heck v. Humphrey***, 512 U.S. 477 (1994). Although courts have determined allegations related to officers' use of force during arrest are not always barred by *Heck*, Plaintiff's claim is precluded in this matter because it relies on facts contrary to the basis of her criminal conviction. The jury in the criminal trial conclusively decided facts against Plaintiff when it concluded Officer Klamser did not use excessive force; had the jury determined he had done so, Plaintiff would have been entitled to an acquittal based on the self-defense jury instruction submitted by Ms. Surat. A ruling in favor of Plaintiff in this civil lawsuit would call into question the validity of both of her criminal convictions. Plaintiff's excessive force claim is, therefore, barred.

In ***Heck***, the Supreme Court held that "when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Heck,* at 487. If so, the Court must dismiss the complaint "unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Id*. A civil claim is not the proper place to challenge a criminal conviction. *Id.* at 486. The Complaint identifies the length in dates, location and disposition of Plaintiff's trial and resultant criminal convictions resulting from her April 6, 2017 arrest by Officer Klamser. Following the five-day misdemeanor trial, she was convicted of C.R.S. § 18-8-103 (Resisting Arrest) and C.R.S. § 18-8-104(1)(a) (Obstructing a Peace Officer). [*Id*., ¶37.]

Pursuant to Colorado law, a person is guilty of obstructing a peace officer "when, by using or threatening to use violence, force, physical interference, or an obstacle, such person knowingly

obstructs, impairs, or hinders the enforcement of the penal law or the preservation of the peace by a peace officer, acting under color of his or her official authority." C.R.S. § 18-8-104(a). A person commits resisting arrest if he knowingly prevents or attempts to prevent a peace officer from effecting an arrest of the actor or another by either: (a) using or threatening to use physical force or violence against the peace officer or another; or (b) using any other means which creates a substantial risk of causing bodily injury to the peace officer or another. C.R.S. § 18-8-103. "'[S]elf-defense is an available defense' against both charges 'when a defendant reasonably believes that unreasonable or excessive force is being used by the peace officer.'" ***Johnson v. Heinis,*** No. 11-cv-3135-WJM-KLM, 2013 U.S. Dist. LEXIS 62342, *8-10 (D. Colo. March 28, 2013)[2]; ***Dye v. Colo. Dep't of Corr***., No. 120cv020601-PAB-KLM, 2013 U.S. Dist. LEXIS 42453, *16-22 (D. Colo. March 26, 2013).

Where the factfinder for the underlying criminal court considered the affirmative defense of self-defense to charges of resisting arrest or obstruction of justice, courts in this Circuit have repeatedly determined that a subsequent Section 1983 excessive force claim is barred by ***Heck*** because an ultimate determination by this Court that the officer used excessive force would call into question the validity of the underlying conviction. ***Agyemang v. City of Aurora Mun. Court***, No. 15-cv-734-LTB, 2015 U.S. Dist LEXIS 60628, *8 (D. Colo. May 8, 2015); ***Kennedy v. Golden***, No. 13-cv-00920-REB-KLM, 2014 U.S. Dist. LEXIS 106409, at *1 (D. Colo. Mar. 4, 2014)[3]; ***Johnson***, 2013 U.S. Dist. LEXIS 62342 at *8-10; ***Dye***, 2013 U.S. Dist. LEXIS 42453 at

[2] *Adopted by* ***Johnson v. Heinis***, 2013 U.S. Dist. LEXIS 62347 (D. Colo., May 1, 2013).

[3] *Adopted by* ***Kennedy v. Golden***, 2014 U.S. Dist. LEXIS 106408 (D. Colo., Aug. 1, 2014).

*16-22; ***Oates v. Patella***, No. 11-cv-1871-REB-KLM, 2012 U.S. Dist. LEXIS 22715, *9-11 (D. Colo. Feb. 1, 2012).[4] Throughout these cases, the plaintiffs were convicted of resisting arrest, obstructing a peace officer, or both, and subsequently filed Section 1983 civil suits against arresting officers for excessive force during the arrest. In determining ***Heck*** barred the Section 1983 claims, the courts all noted the respective juries in the underlying criminal trials received the self-defense/excessive force affirmative defense jury instruction, but rejected the affirmative defense and convicted the plaintiffs.

Similarly, in ***Adams v. Dyer***, 223 Fed.Appx. 757, 759-60 (10th Cir. 2007), the Tenth Circuit affirmed summary judgment where officers were alleged to have used excessive force during an arrest. The suspect was subsequently convicted of resisting arrest and other crimes. ***Id***. He brought Section 1983 claims against arresting officers alleging excessive force during and after the arrest. ***Id***. The Tenth Circuit examined the conduct of each of the officers during each phase of the arrest and held that ***Heck*** barred all claims which were based on actions the officers took as they attempted to arrest him because the claim called into question the legitimacy of the resisting arrest conviction. ***Id***.

In this matter, during the Plaintiff's criminal trial, the jury instructions included a "defense of person" affirmative defense, which informed the jury that Plaintiff could not be found guilty if she was defending herself from unreasonable or excessive force. The instruction further stated that burden rested with the prosecution to prove that Surat's conduct was not legally authorized by the defense. [Jury Instruction No. 10, Larimer County Court Case No. 2017M965, attached as Exhibit A.] *See* ***Sweesy v. Sun Life Assur. Co.***, 643 Fed. Appx. 785, 789 (10th Cir. 2016) (court permitted

[4] *Adopted by* ***Oates v. Patella***, 2012 U.S. Dist. LEXIS 22716 (D. Colo., Feb. 22, 2012).

to take judicial notice of facts which are a matter of public record); ***Hayes v. Lowe***, No. 13-cv-3239-LTB-KMT, 2014 U.S. Dist. LEXIS 179998, *7-8 (D. Colo. Dec. 22, 2014) (taking judicial notice of public documents from County Court proceedings without converting Rule 12(b)(6) motion into motion for summary judgment); ***Makeen v. Colo***., No. 14-cv-3452-WJM-CBS, 2016 U.S. Dist. LEXIS 186118, n. 6 (D. Colo. Sept. 16, 2016).

Thus, the jury received an instruction that Ms. Surat was legally authorized to use physical force upon Officer Klamser to defend herself from what a reasonable person would believe to be the use or imminent use of "**unlawful physical force**" by him. Ex. __ (emphasis added). The jury convicted Plaintiff of resisting arrest *and* obstruction a peace officer, thereby making a finding beyond a reasonable doubt that there was no unlawful (or excessive) physical force by Officer Klamser justifying any claim of self-defense by Ms. Surat. Critically, because this instruction related to both charges for which Plaintiff was ultimately convicted, it is impossible to for this Court to now determine that Officer Klamser unlawfully used excessive force during the course of the arrest without undermining this affirmative defense and, by extension, the validity of Plaintiff's underlying convictions. *See, e.g.*, ***Adams***, 223 F. App'x at 761 ("To find in favor of Adams, the district court would have been required to nullify the jury's rejection of Adams' 'excessive force' defense[.]")

As demonstrated by the allegations of the Complaint, the alleged use of excessive force and the Plaintiff's resistance and obstruction were contemporaneous. The Complaint alleges the entire encounter between Plaintiff and Officer Klamser happened in thirty-two seconds. [ECF 1, ⁋28; see also ⁋ 63 "Defendant Klamser's arrest of Ms. Surat by, among other things, pulling her arm by her wrist and throwing her face-first to the sidewalk, used greater force than would have

been reasonably necessary to effect the seizure."] In other words, the use of force and the resistance and obstruction are inextricably intertwined. Indeed, ***Heck*** bars a plaintiff's civil claim where, as here, "the conviction and the civil claim both arise from a single, continuous struggle . . . [meaning] they are inextricably intertwined." ***Matheney v. City of Cookeville***, No. 08-cv-0066, 2010 U.S. Dist. LEXIS 34515, *13 (M.D. Tenn. Apr. 7, 2010), *citing* ***Cummings v. City of Akron***, 418 F.3d 676, 682-83 (6th Cir. 2005). Accordingly, Plaintiff's excessive force claims against Officer Klamser must be barred and judgement entered for Defendants.

II. The Claim against the City of Fort Collins Must Be Dismissed Because There Is No Underlying Constitutional Violation and the Complaint Fails to Sufficiently Allege Municipal Liability.

a. There is No Underlying Constitutional Violation

It is well-established that a municipality may be held liable under 42 U.S.C. § 1983 only for its own unconstitutional or illegal policies and not for the tortious acts of its employees. ***Monell v. Dept of Soc. Servs. of the City of N.Y.,*** 436 U.S. 658, 694 (1978); ***Barney v. Pulsipher***, 143 F. 3d 1299, 1307 (10th Cir. 1998). "A municipality may not be held liable where there was no **underlying constitutional violation** by any of its officers." ***Hinton v. City of Elwood, Kan.***, 997 F.2d 774, 782 (10th Cir. 1993) (citing ***City of Los Angeles v. Heller***, 475 U.S. 796, 799, *cert. denied*, 476 U.S. 1154 (1986)). Here, because Plaintiff cannot maintain her claim of an alleged constitutional violation against Officer Klamser pursuant to ***Heck***, Plaintiff's claim against the City of Fort Collins must similarly be dismissed. *See, e.g.*, ***Ash v. Twp. Of Willingsboro***, No. 10-1900, 2012 U.S. Dist. LEXIS 179124, *12 (D. N.J. Dec. 18, 2012) ("Supervisory liability claims under ***Monell*** require an underlying constitutional violation and, where the underlying violation is barred by ***Heck***, it cannot form the basis for a derivative ***Monell*** claim.") (collecting cases).

b. The Complaint fails to establish any basis for imposing municipal liability against the City of Fort Collins.

To establish liability of a public entity under 42 U.S.C. §1983, "a plaintiff must show (1) the existence of a municipal custom or policy and (2) a direct and causal link between the custom or policy and the violation alleged." ***Jenkins v. Wood***, 81 F.3d 988, 993 (10th Cir. 1996), citing ***City of Canton v. Harris***, 489 U.S. 378, 385 (1989). The Supreme Court described the requirements a plaintiff must meet to impose public entity liability as follows: "[i]t is not enough for a §1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." ***Bd. Of Cnty. Comm'rs of Bryan Cnty. v. Brown***, 520 U.S. 397, 404 (1998).

Under these standards, municipal liability may arise only out of official customs or policies, or for the actions of a final policymaker to any extent that such policies, customs, or policymakers can be shown to be responsible for a constitutional violation. Municipal liability only attaches where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." ***Pembaur v. City of Cincinnati***, 475 U.S. 469, 483 (1986); ***Myers v. Oklahoma Cnty. Bd. Of Cnty. Comm'rs***, 151 F.3d 1313, 1319 (10th Cir. 1998).

The Plaintiff attempts to set forth a claim against the City entitled "Unconstitutional Policies, Customs, and Practices" (ECF No. 1 at 12-13, ¶ ¶ 67-74). However, the allegations set forth in this claim never rise to a level that would satisfy Federal pleading standards. No

allegations are provided supporting any notion the City maintained any custom or policy relevant to the Plaintiff's 42 U.S.C. §1983 claim, or that anyone followed any specific custom or policy regarding the interaction between the Plaintiff and the City of Fort Collins. Nothing in the Complaint suggests that any specific policy or custom was implicated, deliberately followed, or how any such custom, practice or policy harmed the Plaintiff. Rather, the Plaintiff sets forth only conclusory allegations, which are insufficient to overcome a Motion to Dismiss (*See eg*. ECF No. 1 at ¶ 68, ("Defendant Fort Collins established policies, customs and/or practices in violation of the Constitution"); ("Defendant Fort Collins developed and maintained law enforcement-related policies, customs, and/or practices exhibiting or resulting in a deliberate indifference to the Fourth and Fourteenth Amendment protected constitutional rights…") (ECF No. 1 at ¶ 69); ("Defendant Fort Collins' policies, customs, or practices in failing to train and supervise its employees were the proximate cause of, and moving force behind, the violation of Ms. Surat's constitutional rights…") (ECF No. 1, ¶ 74)). Because the Complaint is devoid of any mention of a specific municipal custom or policy, any effort to state a claim against the City here fails as a matter of law.

Further, the Complaint contains no hint that any deliberate choice to follow a specific course of action was made by anyone responsible for establishing any final policy with respect to any of the Plaintiff. Absent some basis for thinking the City of Fort Collins undertook deliberate conduct that could be said to constitute the "moving force" behind any injury, or that there is any direct causal link between any action by the City of Fort Collins claimed to have deprived the Plaintiff of her Federal rights, there could be no claim against the City of Fort Collins.

Likewise, the Plaintiff fails to provide any specific allegations respecting a failure to train or supervise. Instead, the Complaint merely contains the generic allegation that "(t)he inadequate training and supervision provided by Defendant Fort Collins resulted from a conscious or deliberate choice…Defendant Fort Collins could have and should have pursued reasonable methods for the training and supervising of such employees, yet failed to do so. Plaintiff's efforts do not establish a custom, practice or policy sufficient to overcome this Motion to Dismiss.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request this Court to dismiss Plaintiff's claims against them in their entirety with prejudice, and for all other and further relief as this Court deems proper.

Dated: June 7, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on the 7th day of June, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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