IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JAMES OLIVER,

Plaintiff,

v. No. 04-2074 B

CITY OF MEMPHIS, et al.,

Defendant.

ORDER GRANTING MOTIONS TO DISMISS OF DEFENDANTS CITY OF MEMPHIS AND MILTON AND GREG SISKIN, REMANDING CASE TO STATE COURT AND DISMISSING WITHOUT PREJUDICE AS TO JOHN DOE DEFENDANTS

INTRODUCTION AND BACKGROUND

Before the Court are the motions of the Defendants, City of Memphis (the "City") and Milton and Greg Siskin (sometimes referred to herein as the "Individual Defendants"). On August 17, 2004, the Court entered an order directing the Plaintiff, James Oliver, to show cause why the pending dispositive motions should not be granted based on his failure to respond thereto. In a response to the show cause order and during a status conference held on October 21, 2004, the Court was advised that Oliver had been hospitalized on and off since May 28, 2004, had filed for bankruptcy protection in July 2004,[1] had a petition for a conservator filed on his behalf, and had not been physically or mentally able to sufficiently assist counsel in the preparation of this case.

[1]Counsel for the Plaintiff has advised the Court that the bankruptcy petition was dismissed on August 6, 2004 for failure to satisfy filing requirements. Accordingly, the automatic stay associated with bankruptcy proceedings is not at issue here.

STANDARD OF REVIEW

The motions of the City and the Individual Defendants are based upon Rule 12(b)(6) of the Federal Rules of Civil Procedure, which permits dismissal of a lawsuit for failure to state a claim upon which relief could be granted. See Fed. R. Civ. P. 12(b)(6). The Rule requires the court to "construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle relief." Grindstaff v. Green, 133 F.3d 416, 421 (6th Cir. 1998). However, the court is not required to "accept as true legal conclusions or unwarranted factual inferences." Id. In order to avoid dismissal under Rule 12(b)(6), a complaint must contain either direct or inferential allegations with respect to all the material elements of the claim to sustain recovery under some viable legal theory. Wittstock v. Mark A. Van Sile, Inc., 330 F.3d 899, 902 (6th Cir. 2003); Lewis v. ACB Bus. Servs., Inc., 135 F.3d 389, 406 (6th Cir. 1998). The Court's narrow inquiry on a motion to dismiss under Rule 12(b)(6) "is based upon whether 'the claimant is entitled to offer evidence to support the claims,' not whether the plaintiff can ultimately prove the facts alleged." Osborne v. Bank of Am., Nat'l Ass'n, 234 F.Supp.2d 804, 807 (M.D. Tenn. 2002) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974)). Section 1983 actions are not subject to a heightened pleading standard. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 165-66, 113 S.Ct. 1160, 1161-62, 122 L.Ed.2d 517 (1993).

THE PLAINTIFF'S CLAIMS

The allegations set forth in Oliver's complaint, which must be taken as true, may be summarized as follows. On or about December 29, 2002, Oliver, as president of Southern Equity

Mortgage, was a tenant of Defendant Milton Siskin in an office complex located at 5180 Park Avenue, Memphis, Tennessee. (Compl. for Money Damages at ¶¶ 21,22 (Notice of Removal Ex. A) ("Compl. at ____). On that date, he was conducting business at the premises. (Compl. at ¶ 22.) According to Milton Siskin, he or one of his representatives received notification from his security company that the alarm at the leased premises had been activated. (Compl. at ¶ 23.) Prior to informing the authorities, Milton Siskin made no effort to confirm that the individual at the premises was his lawful tenant or that the vehicle parked outside belonged to Oliver. (Compl. at ¶¶ 24,25).

At approximately 8:30 p.m., Defendant Greg Siskin along with two uniformed police officers forced their way into Southern Equity Mortgage, where Oliver was working. At least one of the officers had his weapon drawn and aimed it directly at the Plaintiff. (Compl. at ¶¶ 26,27.) Oliver, who was in poor health and on oxygen, was detained and threatened by the officers even though he did nothing to provoke such behavior. (Compl. at ¶¶ 27-29.) He was questioned by the officers at gunpoint as to his activities at the leased premises. (Compl. at ¶ 30.) At no time did Greg Siskin confirm Oliver's identity as the tenant of the premises. (Compl. at ¶ 32.) In his complaint, originally filed in the Circuit Court for Memphis, Shelby County, Tennessee[2] against the City, the Individual Defendants, John Doe police officers and The Talley Company,[3] the Plaintiff alleged violations, pursuant to 42 U.S.C. § 1983, of the Fourth Amendment and the Fourteenth Amendment's due process clause, as well as state claims including breach of the lease agreement, negligence, outrageous conduct, malicious prosecution and assault.

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[2]The lawsuit was removed to this Court on February 6, 2004 pursuant to 28 U.S.C. § 1441(b).

[3]In an order entered February 5, 2004, the Plaintiff took a voluntary dismissal without prejudice as to The Talley Company. See Notice of Removal, Ex. B.

ANALYSIS

John Doe Defendants.

At the outset, the Court hereby DISMISSES without prejudice the Plaintiff's allegations against the "John Doe" defendants, as service of process, and, by extension the institution of a lawsuit, cannot be effected on fictitious persons. Furthermore, the Plaintiff is advised that bringing a complaint against John Doe defendants does not toll the statute of limitations as to those parties. See Cox v. Treadway, 75 F.3d 230, 240 (6th Cir.), cert. denied, 519 U.S. 821, 117 S.Ct. 78, 136 L.Ed.2d 37 (1996); Bufalino v. Michigan Bell Tel. Co., 404 F.2d 1023, 1028 (6th Cir. 1968), cert. denied, 394 U.S. 987, 89 S.Ct. 1468, 22 L.Ed.2d 763 (1969).

The City's Motion to Dismiss.

The Plaintiff's claims against this Defendant include violations of his constitutional rights and negligence under the GTLA. As its ruling thereon is dispositive, the Court will deal only with Oliver's federal claims. Section 1983 provides that

> [e]very 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 . . . .

42 U.S.C. § 1983. In order to establish liability under § 1983, the Plaintiff must show that (1) he was deprived of a right secured by the United States Constitution or the laws of the United States and (2) he was subjected or caused to be subjected to the constitutional deprivation by a person acting under color of state law. Searcy v. City of Dayton, 38 F.3d 282, 286 (6th Cir. 1994) (citing Flagg Bros. v. Brooks, 436 U.S. 149, 155, 98 S.Ct. 1729, 1732-33, 56 L.Ed.2d 185 (1978)). Section 1983 does not provide a source of substantive rights "and does not provide

redress for common law torts--the plaintiff must allege a violation of a federal right." Berg v. County of Allegheny, 219 F.3d 261, 268 (3d Cir. 2000), cert. denied, 531 U.S. 1072, 121 S.Ct. 762, 148 L.Ed.2d 664 (2001).

As previously stated, the Plaintiff maintains that the Defendants' actions constituted a violation of his constitutional rights under the Fourth and Fourteenth Amendments. The Fourth Amendment, which applies to the states pursuant to incorporation by the Fourteenth Amendment, protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. These protections apply equally to civil and criminal cases. Daughenbaugh v. City of Tiffin, 150 F.3d 594, 598 (6th Cir. 1998). The Supreme Court has held that "when government behavior is governed by a specific constitutional amendment, due process analysis is inappropriate. Although not all actions by police officers are governed by the Fourth Amendment, the constitutionality of [detentions] by state officials is governed by the Fourth Amendment rather than due process analysis." Berg, 219 F.3d at 268-69 (citing County of Sacramento v. Lewis, 523 U.S. 833, 842-43, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)) (internal citations omitted); see also Alexander v. Beale Street Blues Co., Inc., 108 F.Supp.2d 934, 940-41 (W.D. Tenn. 1999). Therefore, the Court will limit its review of the Plaintiff's detention to the Fourth Amendment claim. See Berg, 219 F.3d at 269.

Local governments, such as the City, are considered "persons" for purposes of § 1983. Holloway v. Brush, 220 F.3d 767, 772 (6th Cir. 2000). This does not mean, however, that municipalities are "liable for every misdeed of their employees and agents." Alkire v. Irving, 330 F.3d 802, 814-15 (6th Cir. 2003) (citation omitted). Municipal liability under § 1983 attaches only "where the 'execution of a government's policy or custom, whether made by its lawmakers or by

those whose edicts or acts may fairly be said to represent official policy, inflicts the injury' complained of." Graham v. County of Washtenaw, 358 F.3d 377, 382 (6th Cir. 2004) (quoting Monell v. Dep't of Social Servs., 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)). The finding of a policy or custom is the initial determination to be made by the trial court on a municipal liability claim. Doe v. Claiborne County, Tenn., 103 F.3d 495, 509 (6th Cir. 1996) (citing Hicks v. Frey, 992 F.2d 1450,1456-57 (6th Cir. 1993), reh'g denied (July 1, 1993)). The Sixth Circuit has instructed that

> [i]t is firmly established that a municipality . . . cannot be held liable under § 1983 for an injury inflicted solely by its employees or agents. For liability to attach, there must be execution of a government's policy or custom which results in a constitutional tort. Such a requirement ensures that a [municipality] is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the [municipality]. The "policy" requirement is not meant to distinguish isolated incidents from general rules of conduct promulgated by city officials. Instead, the "policy" requirement is meant to distinguish those injuries for which the [municipality] is responsible under § 1983, from those injuries for which the [municipality] should not be held accountable.

Gregory v. Shelby County, Tenn., 220 F.3d 433, 441 (6th Cir. 2000) (internal citations omitted).

> A "custom" for purposes of Monell liability must be so permanent and well settled as to constitute a custom or usage with the force of law. In turn, the notion of "law" must include deeply embedded traditional ways of carrying out state policy. It must reflect a course of action deliberately chosen from among various alternatives. In short, a "custom" is a "legal institution" not memorialized by written law.

Doe, 103 F.3d at 507-08 (internal quotation marks and citations omitted). A plaintiff must, in order to show a custom or policy, adduce specific facts in support of his claim. Conclusory allegations will not lie. Culberson v. Doan, 125 F.Supp.2d 252, 263-64 (S.D. Ohio 2000). The Supreme Court has consistently held that a municipality may not be held liable solely on the basis of respondeat superior. See Board of County Comm'rs of Bryan County, Okla. v.Brown, 520 U.S. 397, 404, 117

S.Ct. 1382, 1388, 137 L.Ed.2d 626 (1997); Leatherman, 507 U.S. at 166, 113 S.Ct. at 1162; Collins v. City of Harker Heights, Tex., 503 U.S. 115, 121, 112 S.Ct. 1061, 1066, 117 L.Ed.2d 261 (1992); City of Canton v. Harris, 489 U.S. 378, 392, 109 S.Ct. 1197, 1206, 103 L.Ed.2d 412 (1989); City of St. Louis v. Praprotnik, 485 U.S. 112, 121-22, 108 S.Ct. 915, 923, 99 L.Ed.2d 107 (1988).

It is not enough for a § 1983 plaintiff to identify conduct attributable to a municipality. Rather,

> [t]he 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.

Brown, 520 U.S. at 404, 117 S.Ct. at 1388 (emphasis in original). Thus, to recover, a plaintiff

> must show that his civil rights were violated pursuant to and as a direct result of the [municipality's] official policy or custom. The burden in this regard requires a showing that the unconstitutional policy or custom existed, that the policy or custom was connected to the [municipality], and that the policy or custom caused his constitutional violation.

Napier v. Madison County, Ky., 238 F.3d 739, 743 (6th Cir. 2001) (internal citations omitted). The showing required has been described by courts as a rigorous one. See Black v. City of Memphis, No. 98-6508, 2000 WL 687683, at *3 (6th Cir. May 19, 2000). In this case, the Plaintiff has completely failed to identify or allege the existence of a custom or policy of the City that caused his injury. Accordingly, the motion of the City to dismiss is GRANTED.

The Motions of the Individual Defendants.

It is undisputed that the Individual Defendants were not "state actors." Section 1983 is triggered only by state action, and, generally speaking, private persons acting on their own cannot deprive a citizen of his constitutional rights. See Lansing v. City of Memphis, 202 F.3d 821, 828

(6th Cir. 2000). However, private persons may violate the constitutional rights of another when their "actions so approximate state action that they may be fairly attributed to the state." See id. In order to determine "fair attribution," the Court must find that the action was "taken (a) under color of state law, and (b) by a state actor." Id. (citing Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982)). The Sixth Circuit has established three tests to assist the Court in deciding whether the Lugar conditions have been satisfied: (1) the public function test, (2) the state compulsion test, and (3) the symbiotic relationship or nexus test. Id.

The first test requires that "the private [person] exercise powers which are traditionally exclusively reserved to the state, such as holding elections or eminent domain." Id. (quoting Wolotsky v. Huhn, 960 F.2d 1331, 1335 (6th Cir. 1992)). The second supports a fair attribution finding where the state "exercise[s] such coercive power or provide[s] such significant encouragement, either overt or covert, that in law the choice of the private actor is deemed to be that of the state." Id. at 829 (quoting Wolotsky, 960 F.2d at 1335). Finally, under the symbiotic relationship or nexus test, "the action of a private party constitutes state action when there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." Id. at 830 (quoting Wolotsky, 960 F.2d at 1335). It is not sufficient under the third test to show that public services were utilized by private actors. Id. at 831.

The only test remotely applicable to this case is the symbiotic relationship or nexus test. As the Plaintiff has at most alleged that the Individual Defendants utilized public services in the form of City police officers to harass, injure or frighten Oliver, he has failed to state a constitutional claim against the Individual Defendants upon which relief could be granted.

CONCLUSION

As the Plaintiff's federal claims against the Defendants have been dismissed in their entirety, the Clerk of Court is directed to enter judgment in favor of Defendants City of Memphis, and Milton and Greg Siskin. Further, the Plaintiff's claims under state law are DISMISSED without prejudice. See 28 U.S.C. § 1367(c)(3) (expressly permitting the court to decline the exercise of jurisdiction when it has dismissed all claims over which it has original jurisdiction.) Weeks v. Portage County Executive Offices, 235 F.3d 275, 279-80 (6th Cir. 2000) (district court's decision to decline to exercise supplemental jurisdiction lies within its sound discretion). The Plaintiff's state claims are hereby REMANDED to the Circuit Court of Memphis, Shelby County, Tennessee.

IT IS SO ORDERED this ___ day of December, 2004.

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J. DANIEL BREEN
UNITED STATES DISTRICT JUDGE