[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-15018
Non-Argument Calendar

D.C. Docket No. 1:15-cv-04215-LMM

OLIVER GILES,

Plaintiff-Appellant,

versus

J.B. MANSER,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(December 11, 2018)

Before TJOFLAT, WILLIAM PRYOR and ANDERSON, Circuit Judges.

PER CURIAM:

Oliver Giles appeals the dismissal of his 42 U.S.C. § 1983 complaint alleging false arrest and malicious prosecution in violation of the Fourth Amendment and intentional infliction of emotion distress ("IIED") under Georgia law. On appeal, Giles argues that he met the pleading requirements for his IIED claim under both Georgia and federal law. Giles also appeals the denial of his motion to amend his complaint for a second time, arguing that the motion should have been granted because the amendments would not have prejudiced J.B. Manser, the defendant below, and would not have been futile. Finally, Giles argues that his claims for malicious prosecution and false arrest should not have been dismissed because Manser lacked arguable probable cause when he swore out a warrant for Giles's arrest and therefore was not entitled to qualified immunity.[1] For the reasons set forth below, we affirm in part and vacate in part.

I.

We first consider whether the District Court properly dismissed Giles's IIED claim. We review a district court's order granting a "motion to dismiss for failure to state a claim *de novo*, accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff." *Murphy v. DCI Biologicals Orlando, LLC*, 797 F.3d 1302, 1305 (11th Cir. 2015). A plaintiff's

[1] Because we write for the parties, we set out only what is necessary to explain our decision.

complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face" in order to survive a motion to dismiss for failure to state a claim. *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1289 (11th Cir. 2010) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007)). This standard requires more than labels, conclusions, or a formulaic recitation of the elements of a cause of action. *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1964–65. Moreover, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009).

Under Georgia law, a claim of IIED has four elements: (1) the defendant's conduct was intentional or reckless; (2) the defendant's conduct was extreme and outrageous; (3) there was a causal connection between the wrongful conduct and the plaintiff's emotional distress; and (4) the plaintiff's emotional distress was severe. *Metro. Atlanta Rapid Transit Auth. v. Mosley*, 634 S.E.2d 466, 470 (Ga. Ct. App. 2006).

The IIED-related allegations in Giles's first amended complaint are threadbare[2] and lack enough detail to properly allege IIED under Georgia law. Nevertheless, Giles argues that his IIED claim should not be dismissed for two

[2] The first amended complaint simply states the legal standard for IIED under Georgia law and concludes that false arrest amounts to extreme and outrageous conduct.

reasons. First, Giles argues that, under Georgia case law, improper imprisonment constitutes severe emotional distress. Thus, all Giles had to do to survive the motion to dismiss was plead that he was improperly imprisoned, which he did. While it is certainly true that improper imprisonment *can* produce severe emotional distress under Georgia law, the two cases Giles cites do not establish that an allegation of improper imprisonment suffices to allege all the elements of IIED. Neither of Giles's cited cases concerns the sufficiency of pleadings, and in both cases the plaintiffs relied on more than their improper imprisonment to establish the elements of IIED. *See Turnage v. Kasper*, 704 S.E.2d 842, 849 (Ga. Ct. App. 2010) (describing the "helplessness and despair" plaintiff felt as a result of her imprisonment); *Gordon v. Frost*, 388 S.E.2d 362, 365 (Ga. Ct. App. 1989) ("Mrs. Gordon was shocked, upset, and hysterical, and at first could not understand why she was being arrested."). Unsurprisingly, Georgia courts dismiss IIED claims when plaintiffs fail to allege facts supporting the elements of IIED. *See, e.g.*, *Thompson-El v. Bank of Am., N.A.*, 759 S.E.2d 49, 53 (Ga. Ct. App. 2014) (affirming dismissal of IIED claim because the complaint "failed to allege any acts by the defendants that were extreme and outrageous or that [plaintiff's] emotional distress was so severe that no reasonable person could be expected to endure it."). Thus, to survive a motion to dismiss under Georgia IIED law, Giles was required to plead more than the conclusory allegation that he suffered IIED.

Giles's second argument is that Georgia's pleading standard should apply instead of Rule 8(a)(2) and that, under Georgia's standard, his complaint is not subject to dismissal. Giles is correct to note that Georgia's pleading standard is more lenient than the federal standard. *See Babalola v. HSBC Bank, USA, N.A.*, 751 S.E.2d 545, 549 (Ga. Ct. App. 2013) ("[A] motion to dismiss for failure to state a claim should not be granted unless 'the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof.'" (quoting *Anderson v. Daniel*, 724 S.E.2d 401, 402 (Ga. Ct. App. 2012))). But Giles filed his pendant IIED claim in federal court, so the applicable standard is Rule 8(a)(2). *See Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris*, 781 F.3d 1245, 1259–60 (11th Cir. 2015); *Caster v. Hennessey*, 781 F.2d 1569, 1570 (11th Cir. 1986) (per curiam).[3] Giles was thus required to "state a claim to relief that is plausible on its face," *Twombly*, 550 U.S. at 570, 127 S. Ct. at 1974, consisting of "more than labels and conclusions," *id.* at 545, 127 S. Ct. at 1965–66. This he did not do.[4]

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[3] Although *Palm Beach Golf Center* and *Caster* both involved state pleading standards that were stricter than the federal standard—whereas here the state standard is more lenient—the result is the same: the federal standard applies. *See Hanna v. Plumer*, 380 U.S. 460, 464–474, 85 S. Ct. 1136, 1140–45 (1965).

[4] We are of course mindful that "*pro se* pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed." *Miller v. Donald*, 541 F.3d 1091, 1100 (11th Cir. 2008) (quoting *Hughes v. Lott*, 350 F.3d 1157, 1160 (11th Cir. 2003). Nevertheless, *pro se* plaintiffs are "required . . . to conform to procedural rules." *Loren v. Sasser*, 309 F.3d 1296, 1304 (11th Cir. 2002). Here, Giles has not conformed to Rule 8(a)(2).

II.

We next consider whether the District Court properly denied Giles's motion to amend his complaint a second time. We review a district court's denial of a motion to amend a complaint for abuse of discretion where the district court had discretion to deny the motion as futile. *Coventry First, LLC v. McCarty*, 605 F.3d 865, 869 (11th Cir. 2010) (per curiam). But "we review *de novo* a decision that a particular amendment to the complaint would be futile." *Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007) (per curiam).

Rule 15(a)(1) gives a plaintiff the right to amend a complaint once as a matter of course, so long as no responsive pleading has been filed. Fed. R. Civ. P. 15(a)(1).[5] After that, a plaintiff must seek the consent of the opposing party or the court's leave to amend. Fed. R. Civ. P. 15(a)(2). By the time he moved to amend his first amended complaint, Giles had already amended his complaint once. Thus, the question here is whether the District Court abused its discretion in denying a second amendment under Rule 15(a)(2).

In analyzing this question, this Court has held that a proposed amendment may be denied for futility "when the complaint as amended would still be properly dismissed." *Coventry First*, 605 F.3d at 870 (quoting *Cockrell*, 510 F.3d at 1310).

[5] A motion to dismiss is not a responsive pleading for the purposes of Rule 15. *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1291 (11th Cir. 2007).

Here, Giles's proposed second amended complaint asserts nothing factually different from his first amended complaint; it merely introduces new legal arguments. Because the proposed second amended complaint alleges the same facts as the first amended complaint, which the District Court dismissed, the District Court did not abuse its discretion in denying Giles's motion for futility.[6]

III.

Finally, we come to Giles's § 1983 claims for malicious prosecution and false arrest. The District Court dismissed both of these claims, holding that Manser was protected by qualified immunity. For the reasons discussed below, this was error.

As a preliminary matter, we agree with the District Court that the false arrest claim should be dismissed, but for a different reason. Under Eleventh Circuit precedent, the issuance of a warrant constitutes legal process, and so a plaintiff who claims false arrest pursuant to a warrant is making a claim of malicious prosecution rather than false arrest. *See Calero–Colon v. Betancourt–Lebron*, 68 F.3d 1, 4 (1st Cir. 1995) (holding adopted by the Eleventh Circuit in *Whiting v. Traylor*, 85 F.3d 581, 585 (11th Cir. 1996)) ("As a general rule, an unlawful arrest

[6] Although we hold in part III, *infra*, that the District Court erred in dismissing Giles's § 1983 malicious prosecution claim, his proposed amendment was still futile because the amendment added nothing factually new. In other words, the amendment itself was futile even though the part of the first amended complaint alleging malicious prosecution was not subject to dismissal for the reason the District Court provided.

pursuant to a warrant will be more closely analogous to the common law tort of malicious prosecution. . . . On the other hand, wrongful warrantless arrests typically resemble the tort of false arrest."). Because Giles was arrested pursuant to a warrant, his claim is properly one of malicious prosecution rather than false arrest.

To establish a § 1983 malicious prosecution claim, Giles must prove the elements of the common law tort of malicious prosecution *and* a violation of his Fourth Amendment right to be free from unreasonable seizures.[7] *Grider v. City of Auburn*, 618 F.3d 1240, 1256 (11th Cir. 2010). The elements of malicious prosecution are: "(1) a criminal prosecution instituted or continued by the present defendant; (2) with malice and without probable cause; (3) that terminated in the plaintiff accused's favor; and (4) caused damage to the plaintiff accused." *Id.* (quoting *Wood v. Kesler*, 323 F.3d 872, 882 (11th Cir. 2003)). "When [a] malicious prosecution [claim] is brought as a federal constitutional tort, the outcome of the case does not hinge on state law, but federal law, and does not differ depending on the tort law of a particular state." *Wood*, 323 F.3d at 882 n.17.

[7] Manser challenged Giles's malicious prosecution claim on the grounds that he was entitled to qualified immunity and that Giles failed to state a claim. The District Court did not reach the second question because it resolved the first in Manser's favor. On remand, the District Court will have to determine whether Giles's complaint states a plausible claim for relief, keeping in mind that "pro se pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed." *Miller*, 541 F.3d at 1100.

As to the second requirement—the allegedly violated Fourth Amendment right—it is well established that an arrest without probable cause is an unreasonable seizure in violation of the Fourth Amendment. *Grider*, 618 F.3d at 1256. But "a police officer cannot be liable for malicious prosecution if the arrest warrant was supported by probable cause." *Black v. Wigington*, 811 F.3d 1259, 1267 (11th Cir. 2016). Put another way, "the existence of probable cause defeats a § 1983 malicious prosecution claim." *Grider*, 618 F.3d at 1256. Probable cause is defined as "facts and circumstances 'sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense.'" *Gerstein v. Pugh*, 420 U.S. 103, 111, 95 S. Ct. 854, 862 (1975) (quoting *Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 225 (1964)).

Manser invoked qualified immunity in response to Giles's malicious prosecution claim. To receive qualified immunity, Manser need only prove that he had "arguable" probable cause to arrest Giles. *Grider*, 618 F.3d at 1257. "Arguable probable cause exists where 'reasonable officers in the same circumstances and possessing the same knowledge as the Defendant[] could have believed that probable cause existed to arrest the Plaintiff.'" *Id.* (quoting *Kingsland v. City of Miami*, 382 F.3d 1220, 1232 (11th Cir. 2004)). Thus, our task here is to determine whether, assuming Giles's factual allegations to be true, a

reasonable officer in Manser's position could have found probable cause to arrest Giles.

Manser argues that he had arguable probable cause because he found gloves containing Giles's DNA near the hole between the empty unit and the Family Dollar. As the District Court noted, Giles's complaint alleges that Manser moved the gloves containing Giles's DNA from a pile of sheetrock at the back of the empty unit to the hole between the two buildings. That is, Giles alleges that Manser moved the gloves from a location somewhat near the scene of the crime to the actual scene of the crime. Because of this appeal's procedural posture, we are required to accept Giles's pleaded facts as true. Thus, the sole fact we are left with to support arguable probable cause is the presence of gloves containing Giles's DNA somewhat near the scene of the crime.

This Court has repeatedly held that "[m]ere presence at the scene of a crime, without more, does not support a finding of probable cause to arrest." *Holmes v. Kucynda*, 321 F.3d 1069, 1081 (11th Cir. 2003) (alteration in original) (quoting *United States v. Gonzalez*, 70 F.3d 1236, 1238 (11th Cir. 1995)); *Wilson v. Attaway*, 757 F.2d 1227, 1238 (11th Cir. 1985); *United States v. Irurzun*, 631 F.2d 60, 62 (5th Cir. 1980); *United States v. Ashcroft*, 607 F.2d 1167, 1171 (5th Cir.

1979).[8] Accepting Giles's allegations as true, we are effectively left only with Giles's presence near the scene of the crime as the basis for arguable probable cause that he committed the burglary. If mere presence *at* the scene of the crime is insufficient for probable cause, mere presence *near* the scene of a crime must be *a fortiori*. Thus, we conclude that Giles has adequately pled a violation of his Fourth Amendment right to be free from unreasonable seizure because Manser did not have arguable probable cause to obtain a warrant for Giles's arrest.[9]

IV.

For the reasons discussed above, we affirm the dismissal of Giles's IIED and false arrest claims as well as his request to amend his complaint. We vacate the dismissal of Giles's malicious prosecution claim and remand for proceedings not inconsistent with this opinion.

SO ORDERED.

[8] Decisions of the former Fifth Circuit rendered before close of business on September 30, 1981, are binding authority on this Court. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

[9] By concluding that there was no constitutional violation, the District Court did not need to determine whether Giles's constitutional right was clearly established. On remand, the District Court will need to determine whether the right Manser allegedly violated was clearly established.