

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CATHERINE MOSSBROOKS,

Plaintiff,


vs.

MIAMI-DADE COUNTY, a political
Subdivision of the State of Florida, and
IVAN F. ADVINCULA, individually,

Defendants.

CASE No.: 01-3313-CIV-
MORENO

Magistrate Judge: Dube

01 SEP 21 11:25
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI


**DEFENDANT IVAN F. ADVINCULA's MOTION TO SET ASIDE COURT'S
ORDER AND PLAINTIFF'S MOTION TO AMEND COMPLAINT TO ADD ONE
COUNT AGAINST DEFENDANT ADVINCULA ONLY AND INCORPORATED
MEMORANDUN OF LAW**

The Defendant, IVAN F. ADVINCULA ("Defendant"), individually, by and through his attorney, SUSAN I. NOE, hereby files his Motion To Set Aside Court's Order and Plaintiff's Motion to Amend Complaint to Add One Count Against Defendant Advincula Only and Incorporated Memorandum of Law and states the following:

1. Plaintiff CATHERINE MOSSBROOKS ("Plaintiff"), by and through her attorney filed a Motion to Amend Complaint to Add One Count Against Defendant Advincula Only and Incorporated Memorandum of Law on September 18, 2001.
2. The Court entered an Order Granting Motion to Amend Complaint on September 19, 2001.
3. Plaintiff states in her motion that Defendant did not file a responsive pleading on Plaintiff's counsel by September 18, 2001.

19


4. Defendant's counsel mailed via U.S. first class mail a responsive pleading to the counsel of Plaintiff on September 13, 2001 (see Exhibit A copy of Answer and Affirmative Defenses with Certificate of Service).
5. On September 14, 2001, counsel for the Plaintiff during a telephonic status conference asked Defense counsel, Susan I. Noe, if she had filed a pleading. She stated to Mr. Montalvo, Plaintiff's counsel, and Mr. Drucker, Assistant County Attorney for Miami-Dade County, that she had mailed the Answer and Affirmative Defenses the day before, September 13, 2001.
6. To date, the Assistant County Attorney's office and the Defendant have received their copies.
7. Additionally, in a telephone call with the Clerk's office, this counsel verified that the Court filed Defendant Advincula's Answer and Affirmative Defenses on September 14, 2001.
8. Although Rule 15(a) allows amendment without leave of court prior to service of a responsive pleading, Rule 5(b) states that "Service by mail is complete upon mailing."
9. Defendant Advincula's service is considered complete as of September 13, 2001, the date counsel for Defendant Advincula mailed his responsive pleading.

10. Therefore, the Court's Order Granting Motion to Amend Complaint and Plaintiff's Motion to Amend Complaint to Add One Count Against Defendant Advincula Only and Incorporated Memorandum of Law must be set aside pursuant to Fed.R.Civ.Pro. 15(a) as a responsive pleading had been timely filed, and therefore leave of court or written consent of the adverse party must be obtained before an amendment can be added.
11. However, if this Court denies this Motion to Set Aside the previous Order of the Court, an Amended Answer is attached, so that a default will not be entered against Defendant Advincula prior to any ruling by the Court and before the ten (10) day response period.

[PAGE LEFT INTENTIONALLY SHORT]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed via U.S. mail to: H. JAMES MONTALVO, P.A., Counsel for the Plaintiff, The Museum Tower, West Flagler Street, Penthouse Suite 2850, Miami, FL 33130 and via facsimile (305) 379-7008 and mailed via U.S. mail to Ken Drucker, Assistant County Attorney, 111 N.W. 1st Street, Miami, FL 33128 and via facsimile (305) 375-5634 this 24th day of September 2001.

Respectfully submitted,

SUSAN I. NOE
Attorney for Advincula
1440 JFK Causeway, Suite 321
North Bay Village, FL 33141
Tel: (305) 867-9580
Fax: (305) 867-8058

BY:


SUSAN I. NOE

cc: Ivan Advincula
Original hand-delivered to Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CATHERINE MOSSBROOKS,

Plaintiff,

vs.

CASE No.: 01-3313-CIV-
MORENO

Magistrate Judge: Dube

MIAMI-DADE COUNTY, a political
Subdivision of the State of Florida, and
IVAN F. ADVINCULA, individually,

Defendants.

**DEFENDANT IVAN F. ADVINCULA's ANSWER
AND AFFIRMATIVE DEFENSES**

The Defendant, IVAN F. ADVINCULA ("Defendant"), individually, by and through his attorney, SUSAN I. NOE, hereby files his Answer and Affirmative Defenses and states the following:

JURISDICTION AND IDENTIFICATION OF PARTIES

1. As to paragraph 1, it is admitted.
2. As to paragraph 2, it is admitted.
3. As to paragraph 3, it is admitted.
4. As to paragraph 4, the Defendant admits that he is employed as a police officer by the Miami-Dade Police Department, that he is being sued in his individual capacity, and that he is responsible by law for enforcing the regulations and rules of Miami-Dade's Police Department and insuring that he obeys the laws of the State of Florida and of the United States. However, he denies that at all times relevant to this

action he is employed as a police officer by the Miami-Dade Police Department.

5. As to paragraph 5, it is admitted.
6. As to paragraph 6, the Defendant does not have sufficient knowledge as to be able to admit or deny the truth of the allegations in paragraph 6.
7. As to paragraph 7, it is admitted.

GENERAL FACTUAL ALLEGATIONS

8. As to paragraph 8, the Defendant admits that the Plaintiff was arrested on or about July 17, 1998 by officers of the Miami-Dade Police Department and charged with a misdemeanor, but denies that there was no probable cause or any legal justification for subject arrest.
9. As to paragraph 9, Defendant is without sufficient knowledge as to be able to admit or deny the truth of the allegations in paragraph 9.

COUNT I – FALSE ARREST AGAINST MIAMI-DADE

This Count is not directed to this Defendant and this Defendant readopts and incorporates by reference his answers as set forth herein for paragraphs 1 through 9.

10. As to paragraph 10, Defendant is without sufficient knowledge as to be able to admit or deny the truth of the allegations in paragraph 10.
11. As to paragraph 11, Defendant is without sufficient knowledge as to be able to admit or deny the truth of the allegations in paragraph 11.

**COUNT II – NEGLIGENT RETENTION AND
SUPERVISION AGAINST MIAMI-DADE**

This Count is not directed to this Defendant and this Defendant readopts and incorporates by reference his answers as set forth herein for paragraphs 1 through 9.

12. As to paragraph 12, it is admitted.

13. As to paragraph 13, Defendant admits that Plaintiff continued to complain to Miami-Dade and also initiated an Internal Affairs complaint against him, but denies that is was based on his misconduct directed toward her.

14. As to paragraph 14, Defendant admits that a temporary restraining order was obtained against him, but denies that it was a result of his misconduct toward Plaintiff.

15. As to paragraph 15, it is admitted.

16. As to paragraph 16, Defendant admits that Plaintiff dismissed the restraining order against him while employed with Miami-Dade, but denies that he made several baseless complaints against Plaintiff with Metro-Dade in order to have Plaintiff arrested without justification.

17. As to paragraph 17, Defendant is without sufficient knowledge as to be able to admit or deny the truth of the allegations in paragraph 17.

18. As to paragraph 18, it is denied.

19. As to paragraph 19, Defendant is without sufficient knowledge as to be able to admit or deny the truth of the allegations in paragraph 19.

COUNT III – CIVIL RIGHTS CLAIM AGAINST METRO-DADE

This Count is not directed to this Defendant and this Defendant readopts and incorporates by reference his answers as set forth herein for paragraphs 1 through 19.

20. As to paragraph 20, it is admitted.

21. As to paragraph 21, it is denied.

22. As to paragraph 22, Defendant is without sufficient knowledge as to be able to admit or deny the truth of the allegations in paragraph 22.

23. As to paragraph 23, Defendant is without sufficient knowledge as to be able to admit or deny the truth of the allegations in paragraph 23.

COUNT IV – CIVIL RIGHTS VIOLATIONS – AGAINST ADVINCULA

The Defendant readopts and incorporates by reference his answers as set forth herein for paragraphs 1 through 9 and 12 through 16, as if fully set forth herein.

24. As to paragraph 24, it is denied.

25. As to paragraph 25, it is denied.

26. As to paragraph 26, it is denied.

27. As to paragraph 27, it is denied.

FIRST AFFIRMATIVE DEFENSE

28. Defendant IVAN ADVINCULA's actions in conjunction with this suit with regard to the Plaintiff were undertaken in his private capacity as a

private citizen of the United States and therefore are not actionable under state action or color of law.

SECOND AFFIRMATIVE DEFENSE

29. Defendant IVAN ADVINCULA's actions in conjunction with this suit with regard to the Plaintiff are reasonable and warranted by the circumstances and therefore Defendant ADVINCULA is immune from suit due to qualified immunity.

THIRD AFFIRMATIVE DEFENSE

30. Any injuries suffered by the Plaintiff MOSSBROOKS were the proximate cause and result of actions taken by the Plaintiff MOSSBROOKS, and that as a proximate result thereof the damages, if any, should be denied or reduced.

FOURTH AFFIRMATIVE DEFENSE

31. Any injuries or damages suffered by the Plaintiff MOSSBROOKS were a result of her own conduct and negligence, which caused or contributed to such injuries, and any award must be denied or reduced accordingly and comparatively.

FIFTH AFFIRMATIVE DEFENSE

32. The Plaintiff MOSSBROOKS was arrested by the Miami-Dade Police Department, whose responsive actions as well as the actions of Plaintiff MOSSBROOKS constituted an intervening cause so that any damages resulting may not be charged to Defendant ADVINCULA.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Defendant Ivan F. Advincula's Answer and Affirmative Defenses were mailed via first class U.S. mail to: H. James Montalvo, Esq., 801 Brickell Avenue, Suite 1000, Miami, FL 33131 and Kenneth B. Drucker, Assistant County Attorney, 111 N.W. 1st Street, Suite 2810, Miami, FL 33128-1993 this 13th day of September 2001.

Respectfully submitted,

SUSAN I. NOE
Attorney for Advincula
1440 JFK Causeway, Suite 321
North Bay Village, FL 33141
Tel: (305) 867-9580
Fax: (305) 867-8058

BY: 
SUSAN I. NOE

cc: Ivan Advincula