

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

FRANK DAVIS,

Plaintiff,

Case No. 3:08-cv-412

Judge Thomas M. Rose

-v-

**THE CLARK COUNTY BOARD OF
COMMISSIONS, et al.,**

Defendants.

**ENTRY AND ORDER GRANTING THE OHIO ACTING ATTORNEY
GENERAL'S MOTION TO DISMISS (Doc. #9) AND DISMISSING THE
OHIO ACTING ATTORNEY GENERAL FROM THIS CASE**

This is a complaint by Plaintiff Frank Davis ("Davis") against The Clark County Board of Commissions, the City of Springfield, the Ohio Acting Attorney General and several individuals associated with the Clark County Board of Commissions and the City of Springfield. Davis brings seven (7) Claims for wrongful imprisonment, false arrest, conversion, invasion of privacy and for violations of the U.S. Constitution pursuant to 42 U.S.C. § 1983. (Doc. #3.)

Now before the Court is Defendant Ohio Attorney General's Motion To Dismiss¹ brought pursuant to Fed. R. Civ. P. 12(b)(6). (Doc. #4.) Davis opposes this Motion. The time has run and the Ohio Attorney General has not replied. Therefore, this Motion is now ripe for decision.

STANDARD OF REVIEW

The purpose of a Rule 12(b)(6) motion to dismiss is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the

¹Presumably this Motion To Dismiss is brought on behalf of the Acting Ohio Attorney General who is the named Defendant in this case.

complaint is true. *Mayer v. Mylod*, 988 F. 2d 635, 638 (6th Cir. 1993)(citing *Nishiyama v. Dickson County, Tennessee*, 814 F.2d 277, 279 (6th Cir. 1987)). Put another way, “the purpose of a motion under Federal Rule 12(b)(6) is to test the formal sufficiency of the statement of the claim for relief; the motion is not a procedure for resolving a contest between the parties about the facts or the substantive merits of the plaintiff’s case.” 5B Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1356 (3d ed. 2004) Further, for purposes of the motion to dismiss, the complaint must be construed in the light most favorable to the plaintiff and its allegations taken as true. *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

To survive a 12(b)(6) motion to dismiss, a plaintiff must provide more than labels and conclusions, and a formulaic recitation of the elements of a cause of action is not enough. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007)(citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). “[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.” *Id.* at 1969. However, the factual allegations must be enough to raise a right to relief above the speculative level. *Bell Atlantic Corp.*, 127 S.Ct. at 1965(citing 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, p. 235-236 (3d ed. 2004)). The factual allegations in the complaint, even if doubtful in fact, must do something more than merely create a suspicion of a legally cognizable right. *Id.*

Also, to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), “a ... complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory.” *Columbia Natural Resources, Inc. v. Tatum*, 58 F. 3d 1101 (6th Cir. 1995), *cert. denied*, 516 U.S. 1158 (1996). The Court “need not accept as true legal conclusions or unwarranted factual inferences.” *Morgan v. Church’s Fried Chicken*, 829 F.

2d 10, 12 (6th Cir. 1987). Put another way, bare assertions of legal conclusions are not sufficient. *Lillard v. Shelby County Bd. of Educ.*, 76 F. 3d 716, 726 (6th Cir. 1996). It is only well-pleaded facts which are construed liberally in favor of the party opposing the motion to dismiss. *Id.*; see also *Wright & Miller, supra*, §1357.

ANALYSIS

The Acting Ohio Attorney General argues that she is named as a defendant as a result of Davis's effort to comply with Ohio Rev. Code § 2721.12 and should not have been because Davis's Complaint makes no allegations against her and because Ohio Rev. Code § 2721.12 does not require that she be named as a defendant in this action. Davis responds that he has asserted a cause of action against the police officers, county prosecutors, county commissioners and the City of Springfield, all of which are either political subdivisions of Ohio or employees of the various political subdivisions. As such, their conduct is state action chargeable against the state under a 1983 claim.

To state a claim under § 1983, Davis must satisfy three requirements. *Nishiyama*, 814 F.2d at 279. He must show that the conduct at issue was taken under color of state law, he must show that the conduct deprived him of constitutional rights and he must show that the deprivation occurred without due process of law. *Id.*(citing *Screws v. United States*, 325 U.S. 91 (1945)).

It is true that Davis has apparently asserted a 1983 claim against the police officers, county prosecutors, county commissioners and the City of Springfield. It is also true that Davis has asserted that these entities were acting under color of state law.

However, Davis has confused the "state" referred to in "acting under color of state law,"

with the State of Ohio. The “state” referred to in “acting under color of state law,” is not necessarily the State of Ohio.

The definition of “acting under color of state law” requires that the defendant have exercised power “possessed by virtue of state law and made possible only because the defendant is clothed with the authority of state law.” *West v. Atkins*, 487 U.S. 42, 49 (1988)(citing *United States v. Classic*, 313 U.S. 299, 326 (1941)). The State of Ohio is, of course, but one political entity. A defendant may have exercised power possessed by virtue of state law and made possible because the defendant is clothed with the authority of the state without being an employee of the State of Ohio. A law enforcement officer in an Ohio municipality or an Ohio county enforcing a state law is but one example.

Davis has also confused the State of Ohio with the Acting Ohio Attorney General. The Acting Attorney General is named as defendant in Davis’s Complaint but his argument in response to the Acting Attorney General’s Motion To Dismiss discusses the State of Ohio. For legal purposes, the State of Ohio may, of course, be a separate entity from the Attorney General of the State of Ohio.

In this case, Davis’s Complaint does not claim that the Ohio Attorney General, the office of the Ohio Attorney General or any of its employees took part in, or had any relationship to, any of the alleged factual circumstances. As a result, the Acting Ohio Attorney General is not made aware of any legal claim against her.

Further, Davis’s Complaint does not set forth any claims against the State of Ohio. He now argues that the State of Ohio’s practices include functions and/or actions evidenced by the State of Ohio’s participation through Clark County, a political subdivision of the State of Ohio.

However, this argument too is without merit.

As Davis recognizes, Clark County is a political subdivision of the State of Ohio and not the State of Ohio. Clark County is legally authorized to sue and be sued all by itself and without any involvement of the State of Ohio. If Davis is able to sue the State of Ohio, he should have done so. Yet, Davis's Complaint neither names the State of Ohio as a defendant nor puts the State of Ohio on notice of any claims against it.

Even if everything that Davis has alleged in his Complaint is true, he has not made a claim against the Acting Ohio Attorney General or against the State of Ohio. Therefore, the Acting Ohio Attorney General's Motion To Dismiss (doc. #4) is GRANTED. The Acting Ohio Attorney General is DISMISSED from this case.

DONE and **ORDERED** in Dayton, Ohio this Tenth day of February, 2009.

s/Thomas M. Rose

THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record