UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JAMIE ANDERSON, JACKIE ANDERSON, XARIA ANDERSON and SHAE ANDERSON,

Plaintiffs,

v.

KITSAP COUNTY, KITSAP COUNTY SHERIFF'S DEPARTMENT, TIM PETERSON, SERGEANT JIM WHITE, and OXFORD SUITES AFFILIATION OF HOTELS,

Defendants.

CASE NO. C09-5282 KLS

ORDER

The Plaintiffs initially filed their Complaint in Pierce County Superior Court on April 8, 2009 and the case was removed to federal court on May 14, 2009. The undersigned is the trial judge on this matter based on the consent of the parties. In that regard, the parties are reminded to utilize the initials KLS in all captions rather than RJB.

Kitsap County, Kitsap County Sheriff's Department and Sergeant Jim White (County

Defendants) filed a Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim as well as a Fed. R. Civ. P. 56 summary judgment motion to dismiss. Dkt. 24. Except as noted below, the Court is treating the County Defendants' motion as a 12(b)(6) motion.

The Defendants filed their Response and in support of their response, submitted a pleading entitled "Plaintiffs' Answer to County's Interrogatories." Dkt. 27.2. This document, however, does not set forth the specific questions addressed in the Interrogatories, it just includes answers, so the Court is left to guess as to the question. The Court also notes that the Plaintiffs do not specifically reference the attachment in their Response (Dkt. 27) except, perhaps, with the following statement appearing at page 7 of their Response relating to their claim of Intentional Infliction of Emotional Distress: "The facts stated, signed under oath by Mr. and Mrs. Anderson, attest to the contrary." However, review of the Answers to Interrogatories shows only that Mr. Anderson signed them under oath. The Court will, however, consider the Answers to Interrogatories when analyzing the Intentional Infliction of Emotional Distress claim.

FACTS ALLEGED IN PLAINTIFFS' COMPLAINT[1]

Harrison Medical Center made arrangements to pay for the Plaintiffs stay with the Oxford Suites while Mr. Anderson was interviewing for a position at Harrison Medical Center. The arrangement was for Oxford Suites to direct bill Harrison Medical Center for the plaintiffs stay beginning November 4, 2007 through November 8, 2007. In fact, when Mr. Anderson checked into the hotel he was advised by the clerk that the Medical Center had already paid for his hotel room.

[1] For purposes of the 12(b)(6) Motion to Dismiss, the Court accepts, as true, the facts, as alleged in the Plaintiffs' Complaint.

On November 6, 2007 and upon returning to their room around 7:30 p.m. the plaintiffs found a note from the Oxford Suites general manager, Tim Peterson, stating that he wanted to speak with them. The plaintiffs were not able to enter their hotel room as their key card no longer worked.

When Mr. Anderson went to see Mr. Peterson, Mr. Peterson demanded a credit card from Mr. Anderson for payment of the nights the plaintiffs had stayed there as well as for the rest of his stay. Mr. Peterson did not believe the plaintiff's statement that Harrison Medical was to be direct billed and he also accused Mr. Anderson of a number of things, including defrauding the hotel and that Harrison Medical Center had never heard of him. Mr. Anderson showed Mr. Peterson e-mail reservation confirmation documents Mr. Anderson had received from Harrison Medical Center. Mr. Peterson refused to accept this e-mail and called the sheriff.

Within minutes of returning to his room, after having received an operable key from Mr. Peterson, Sheriff Deputy Jim White knocked at the plaintiff's hotel door. Deputy White was immediately rude and aggressive to plaintiff. He reached into the room and grabbed plaintiff's wrist and twisted his arm around to his back, spinning him around and placing him into handcuffs.

Mr. Anderson was taken to the lobby and then to the parking lot where he was forced to endure the taunting of hotel guests. While in the parking lot other police officers were also pointing and gawking at him as he was placed into the squad car. Other Caucasian deputies arrived in their squad cars and stood watching the scene as it unfolded. They were pointing, gawking and drawing the attention of hotel guests and the public to the plaintiffs.

Deputy White told Mr. Anderson he was under arrest and that he had an e-mail from Sue Wallace, Recruiting Manager for Harrison Medical Center, stating that she had never heard of

Mr. Anderson. Deputy White briefly showed this e-mail to the plaintiff but would not let him hold it or read it.

Deputy White also directed Jackie Anderson, who was 8 ½ months pregnant and caring for their two daughters, ages 2 and 3, to leave the hotel or she too would be arrested. Mrs. Anderson had to pack their belongings into suitcases and load them into their vehicle. Deputy White refused to assist Mrs. Anderson with loading her vehicle when requested to do so by Mr. Anderson.

Mr. Anderson's wallet and jacket were taken from him and searched without his consent. However, it is unknown as to who took or searched the wallet and jacket.

Mr. Anderson was detained in the squad car for two hours during which time he repeatedly asked for an explanation as to why he was being detained. The only explanation Deputy White gave was that the plaintiff was not who he said he was and that he was defrauding the hotel. More specifically, Deputy White made the following two statements to the plaintiff: (1) "You are not who you say you are" and (2) "You're defrauding the hotel."

Mr. Anderson emotional turmoil was increased by the fear that his wife and children would have no idea as to what became of him. He asked to speak to his wife repeatedly and someone continuously denied those requests.

At the end of the two hours, without apology or explanation, Mr. Anderson's property (wallet and jacket) was returned to him and he was told he was free to go. Mr. Anderson was later charged with criminal trespass in Kitsap County District Court. He plead not guilty and the charge was later dismissed for lack of evidence.

The entire events caused the plaintiffs, including the two children ages 2 and 3, extreme emotional distress, humiliation, embarrassment and anger. For Mr. Anderson, having to witness

the stress and humiliation his wife and children experienced caused him extreme emotional distress. The Complaint asserts that "Plaintiff" had to seek medical help due to the emotional distress caused by defendants and the Court assumes that reference to plaintiff in the singular is reference to Mr. Anderson.

Mr. Anderson did obtain a job at Harrison Medical Center but he asserts that the relationship was damaged from the beginning due to the defendants' actions and that he was released from his position at the end of 2008, which, the court notes, was more than a year following the incident.

COUNTY DEFENDANTS' MOTION

The County Defendants move to dismiss the following claims: Claim I: Illegal Detention and Search; Claim II: Violation of Fourth, Fifth and Fourteenth amendment Rights, and Right to Due Process; Claim III: Malicious Prosecution; Claim IV: Defamation; and Claim VII: Intentional Infliction of Emotional Distress.

The Plaintiffs' Response (Dkt. 27) was directed only to Claim III: Malicious Prosecution; Claim IV: Defamation, and Claim VII: Intentional Infliction of Emotional Distress. The Plaintiff did not file any opposition to the County Defendants' motion to dismiss Claims I or II.

FAILURE TO STATE A CLAIM

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. . . . Where a complaint pleads facts that are 'merely consistent

with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009).

> In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Id. at p. 1950.

DISCUSSION

Claims I and II: The County Defendants moved to dismiss these two claims in on the basis that the Complaint failed to provide grounds to support the plaintiffs' entitlement to relief. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-1965 (2007) and *Ashcroft v. Iqbal,* 556 U.S. ____, 129 S.Ct. 1937 (2009). They asserted that it was unclear what claim was being asserted, the legal basis therefore, or even which of the Plaintiffs is making the claim.

The Plaintiffs did not mention these two claims in their response. Local Rule 7(b)(2) states that "[i]f a party fails to file papers in opposition to a motion, such failure may be considered by the court as an admission that the motion has merit." The Court is considering such failure to even mention the two claims as such an admission and the undersigned hereby GRANTS the County Defendants' motion to dismiss Claims I and II.

Claim III: Malicious Prosecution. Counsel for the County Defendants, Ione George, included in her declaration (Dkt. 25) a certified copy of the criminal complaint that was filed against Mr. Anderson in Kitsap County District Court. Dkt. 25, Exh. B. The Court notes that it is undisputed that James Anderson was charged with criminal trespass. The criminal complaint

shows that it was filed in Kitsap County District Court and that it was signed by Deputy Prosecuting Attorney Bonnie M. Martin on May 8, 2008. Other documents are also included in Exhibit B, including a verified Kitsap County Sheriffs Office Report authored by Deputy Lee Watson. No explanation, however, has been provided as to the significance of this Report. It appears that the declaration of Ione George was filed solely with regard to the malicious prosecution claim.

Ms. George's declaration also purports to attach, as Exhibit A, a certified copy of the inside of the Kitsap County district Court file "where the court noted its finding of probable cause on July 14, 2008." Dkt. 25. A review of Exhibit A shows a date of "7-14.08" followed by illegible initials. Pursuant to Fed. R. Civ. P. 56, an affidavit "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." Ms. George has made no showing with regard to the interpretation she makes as to the significance of the date and initials that are shown on the certified attachment. The Court declines to conclude from this limited information that a judicial officer made a finding of probable cause.

Inasmuch as the Court is only considering the certified copy of the criminal complaint for purposes of the County Defendants' motion, it is not necessary to convert the motion to dismiss to a motion for summary judgment. The criminal complaint just confirms the fact asserted by the Plaintiffs – that a criminal trespass charge was filed – and it also confirms what is common knowledge, that such a charge can only be brought by a prosecuting attorney.

To maintain a common law claim of malicious prosecution, Mr. Anderson must prove the following: (1) that the prosecution claimed to have been malicious was instituted or continued by the County Defendants; (2) that there was want of probable cause for the institution or

continuation of the prosecution; (3) that the proceedings were instituted or continued through malice; (4) that the proceedings terminated on the merits in favor of the plaintiff, or were abandoned; and (5) that the plaintiff suffered injury or damage as a result of the prosecution. *Gem Trading Company, Inc. v. Cudahy Corporation,* 92 Wn.2d 956, 962-963 (1979); *Bender v. City of Seattle,* 99 Wn. 2d 582, 593 (1983).

However, the passage of R.C.W. 4.24.350 removed the common law requirement that Mr. Anderson prove the fourth element – the proceedings terminated on the merits in favor of the plaintiff, or were abandoned. R.C.W. 4.24.350 reads as follows:

> In any action for damages, whether based on tort or contract or otherwise, a claim or counterclaim for damages may be litigated in the principal action for malicious prosecution on the ground that the action was instituted with knowledge that the same was false, and unfounded, malicious and without probable cause in the filing of such action, or that the same was filed as a part of a conspiracy to misuse judicial process by filing an action known to be false and unfounded.

It is also true that a prosecuting attorney is the only individual authorized to file a criminal prosecution. However, that charging decision is necessarily predicated on information provided by law enforcement. In this case, the Plaintiffs have not presented any competent evidence nor have they alleged any facts to support a conclusion that the criminal trespass charge was "instituted or continued" based on information provided by Sergeant White or any of the other County Defendants. Nor have they asserted or alleged any facts upon which the Court could conclude that Sergeant White or any of the other County Defendants instituted or continued the proceeding "through malice." Mr. Anderson merely states in his Complaint that he was charged with criminal trespass. He has wholly failed to present any facts to support a claim of malicious prosecution by the County Defendants.

The County Defendants' Motion to Dismiss Claim III asserting Malicious Prosecution is hereby GRANTED.

Claim IV: Defamation. Mr. Anderson states in his Complaint that "Defendants defamed Mr. Anderson by intentionally making false assertions about him in declarations and oral statements made during the course of their false arrest and malicious prosecution against Mr. Anderson, in an attempt to further their Malicious Prosecution and to besmirch the reputations of Mr. Anderson." The only facts alleged in his Complaint, as they pertain to the County Defendants and which could be considered statements are the two statements attributed to Sergeant Jim White: (1) "You are not who you say you are" and (2) "You're defrauding the hotel." These statements were made to the Plaintiff while he was in the squad car.

Under Washington case law, a defamation plaintiff must establish four essential elements to recover: (1) falsity; (2) an unprivileged communication; (3) fault; and (4) damages. *Mark v. Seattle Times,* 96 Wn.2d 473, 486, 635 P.2d 1081 (1981); *Bender v. City of Seattle,* 99 Wn.2d 582, 599, 664 P.2d 492 (1983). Inasmuch as the plaintiff is a private individual, the degree of fault necessary to make out a prima facie case is that of negligence. *Bender, supra,* at p. 599.

Washington recognizes a qualified privilege for police officers in releasing information to the public and press. This acknowledges the right to inform the public but also clarifies that the right to inform the public does not include a "license to make gratuitous statements concerning the facts of a case or disparaging the character of other parties to an action. (citations omitted)." *Id.* at p. 601.

However, this Court need not even consider the issue of qualified privilege as no facts have been asserted by the Plaintiff to support the conclusion that Sergeant White or any of the other County Defendants "communicated" any disparaging statement to others regarding Mr.

Anderson. The two statements attributed to Sergeant White were statements made by Sergeant White to Mr. Anderson in response to Mr. Anderson's inquiry. There are no facts asserted in the Complaint that suggest there was any "communication" to others much less any facts to suggest that there was any "unprivileged communication" to others. The mere making of a statement by a defendant to the plaintiff, even if it is completely false and unfounded, does not then create a factual basis for a defamation claim. Someone else, other than the plaintiff, must have received the communication.

The Court notes the suggestion, in Plaintiffs' Response (Dkt. 27) that the "Andersons were defamed by the implications of the way Jamie was arrested and prosecuted for Trespass." The law of defamation does not support a claim by way of "implication." A statement must be made by the County Defendants and that statement must be communicated to others by the County Defendants.

Inasmuch as there are no facts alleged or asserted by the Plaintiff that the County Defendants "communicated" a false statement to anyone other than the Plaintiff, their motion to dismiss Count IV – Defamation is GRANTED.

Claim IV: Intentional Infliction of Emotional Distress.

A claim for intentional infliction of emotional distress, also referred to as the tort of outrage, requires a showing of: (1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress. *Rice v. Janovich,* 109 Wn.2d 48, 61, 742 P.2d 1230 (1987).

The conduct must be such that it is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly

intolerable in a civilized community." *Grimbsy v. Samson,* 85 Wn.2d 52, 59, 530 P.2d 291 (1975).

When a claim of outrage is made, the trial court must make an initial determination as to whether the alleged conduct was so extreme and outrageous as to warrant a factual determination by the jury. *Jackson v. Peoples Fed. Credit Union,* 25 Wn.App. 81, 84, 604 P.2d 1025 (1979). In conducting its analysis, the court must consider: (1) a defendant's position; (2) whether the plaintiff was particularly susceptible to emotional distress, and if the defendants knew this fact; (3) whether the defendants' conduct may have been privileged under the circumstances; (4) whether the degree of emotional distress caused by a party was severe as opposed to mere annoyance, inconvenience, or normal embarrassment; and (5) whether the actor was aware that there was a high probability that his or her conduct would cause severe emotional distress and proceeded in a conscious disregard of it. *Spurrell v. Bloch,* 40 Wn. App. 854, 862, 701 P.2d 529 (1985), *rev. denied,* 104Wn.2d 1014 (1985).

This case stems from the arrest, by Sergeant White, of Jamie Anderson for what the hotel manager considered to be an attempt to defraud the hotel by failing to pay for use of the hotel room. The claim for outrage as against the County Defendants is necessarily based on the actions of Sergeant White. A review of the factual assertions in the Complaint show the Sergeant White was rude and aggressive towards Jamie Anderson when Mr. Anderson was arrested and handcuffed while in his hotel room. That Sergeant White led Mr. Anderson to his patrol car having to go through the lobby and into the parking lot. While he was walking to the patrol car Mr. Anderson endured the taunting of hotel guests – but there are no facts alleged as to what constituted the "taunting." While in the parking lot, other police officers, not parties to this

action, were pointing and gawking at Mr. Anderson as he was placed in the squad car. Mr. Anderson was detained in the squad car for two hours.

Sergeant White ordered Jackie Anderson to leave the hotel or she would be arrested. Sergeant White refused to allow Mr. Anderson to help his wife pack their things, to load their belongings into their vehicle, to care for their two small children during this time or to speak with his wife. Other non-parties, identified as hotel guests, made disparaging remarks regarding both Mr. and Mrs. Anderson.

At the conclusion of the two hours, Mr. Anderson was released and told he was free to go.

The Plaintiffs assert, in their complaint, that they all (Jamie Anderson, Jackie Anderson, and their two small children) suffered extreme emotional distress, humiliation, embarrassment, and anger and they assert that the County Defendants acted out of racial and ethnic discrimination and profiling. The Court notes, however, that these are conclusions without factual support. Specifically, there are no facts alleged or asserted to support a conclusion that Sergeant White acted out of racial and ethnic discrimination and profiling. The statement attributed to Sergeant White by Mrs. Anderson clearly reflects a poor choice of words, but without more is insufficient to lead to the conclusion that racial profiling or discrimination played a role in his response to the call from the hotel.

The only facts contained in their Complaint regarding extreme emotion distress is that Mr. and Mrs. Anderson had difficulty sleeping at night and concentrating during the day, and that they sought medical help for the emotional distress caused by the County Defendants. However, the plaintiffs again do not assert any facts with regard to the medical help they sought

or received. They assert no facts relating to their two young children other than the fact they were crying and upset during the time the events were unfolding at the hotel.

Mr. Anderson alleges that the incident damaged his employment relationship with Harrison Medical Center but he asserts no facts in his Complaint to support that conclusion. In their Interrogatories Answers (Dkt. 27-2), Mr. Anderson states he felt ostracized to some degree from individuals with whom he worked. He also alleges frustration and anxiety regarding the charge of Criminal Trespass, but as noted above, the Plaintiffs claim of malicious prosecution cannot proceed against the County Defendants so the difficulties associated with the criminal charge are not attributable to Sergeant White. Mrs. Anderson asserts that she had to watch her husband being treated shamefully, humiliated and arrested. She also asserts that Sergeant White referred to her husband as a "Fucking Nigger."

As noted above, the Court is required to make an initial determination as to whether there are facts sufficient to allow the claim of Intentional Infliction of Emotional Distress to go to the jury. The undersigned finds that there are not.

Sergeant White is a police officer in Kitsap County, it was due to his position that he responded to situation at the Oxford Suites hotel. There are no facts asserted or alleged that suggest Sergeant White was aware of anything that would make the plaintiffs particularly susceptible to emotional distress. In fact, Sergeant White and the plaintiffs did not know each other prior to the incident of November 6, 2007.

Neither of the parties addressed the issue of privilege nor shall the undersigned.

However, a determining factor is the fact that the plaintiffs have failed to present any facts or assert any facts to support a conclusion that they suffered severe emotional distress. At the most, they allege difficulty sleeping and concentrating. That is far short of severe emotional

distress. They also present no facts to support the claim of the two young children that they suffered severe emotional distress.

Finally, there are no facts asserted or alleged to support the conclusion that Sergeant White was aware that there was a high probability that his conduct would cause severe emotional distress and that he proceeded in conscious disregard of that.

In order to survive a motion to dismiss, the plaintiffs must allege fact sufficient to support each element of the claim for intentional infliction of emotional distress. They have failed to do so.

The County Defendants motion to dismiss Claim IV: Intentional Infliction of Emotional Distress is GRANTED.

CONCLUSION

The Court GRANTS the County Defendants' motion to dismiss (Dkt. 24)and all claims against Kitsap County, Kitsap County Sheriff's Department and Sergeant Jim White are hereby dismissed.

Dated this 1st day of June, 2010.

Karen L. Strombom
United States Magistrate Judge