VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 21-CV-03247

Grundy, Alexus and Barreda, Grey v. City of Burlington

DECISION ON MOTION TO AMEND COMPLAINT

Plaintiffs Alexus Grundy and Grey Barreda, former occupants of a homeless encampment located off Sears Lane in Burlington, seek to amend their complaint to add other former occupants and assert new claims stemming from the City of Burlington's removal of all occupants from the property. They seek a declaration that all occupants were tenants with the legal right to occupy the encampment. They allege that the City violated their due process rights by unlawfully ejecting them from the property, and their Fourth Amendment and Article 11 rights by unlawfully seizing and destroying personal property (Counts I and II). Plaintiffs also assert claims for false imprisonment (Count III) and intentional infliction of emotional distress ("IIED") (Count IV). The court grants the motion in part and denies it in part.[1]

Procedural Background

Ms. Grundy and Mr. Barreda originally brought this action to enjoin the City's removal action. After an evidentiary hearing, the court denied the request for a preliminary injunction, and the City proceeded to remove the occupants and their possessions from the encampment. The City then moved to dismiss the action as moot. The court granted that motion, without prejudice to Ms. Grundy and Mr. Barreda's right to move to amend to state a live claim.

On April 5, 2022, Ms. Grundy and Mr. Barreda filed a "Motion for Leave to File Amended Complaint," but failed to submit a proposed amended complaint. Accordingly, by entry dated May 10, 2022, the court allowed them until May 31, 2022 to submit a proposed amended complaint. On May 31, they filed that paper. On July 1, the City filed a "Motion to Dismiss Amended Complaint." Technically, this motion was premature, as the court had not yet ruled on the motion to amend. Rather than rejecting the filing on this technicality, the court instead treats the motion and subsequent briefing as supplemental briefing on the motion to amend.

[1] Notably, while the Proposed Amended Complaint alleges wrongful eviction, it does not seek damages for the eviction itself. Thus, this decision does not reach the question whether such a claim would lie.

Discussion

The standard on a motion to amend a complaint is familiar. Amendments to the pleadings may be allowed at any time by leave of the court. *See* V.R.C.P. 15(a); *Gauthier v. Keurig Green Mountain, Inc.*, 2015 VT 108, ¶ 43, 200 Vt. 125; *Hunters, Anglers and Trappers Ass'n of Vermont, Inc. v. Winooski Valley Park Dist.*, 2006 VT 82, ¶ 17, 181 Vt. 12 (quoting *Bevins v. King*, 143 Vt. 252, 254-55 (1983)); *Lillicrap v. Martin*, 156 Vt. 165 (1991). Nevertheless, " 'denial of a motion under Rule 15(a) may be justified based upon . . . futility of amendment.' " *Prive v. Vermont Asbestos Group*, 2010 VT 2, ¶ 13, 187 Vt. 280, 286–87 (2010) (quoting *Colby v. Umbrella*, 2008 VT 20, ¶¶ 12–13, 184 Vt. 1). "Amendment is futile if the amended complaint cannot withstand a motion to dismiss." *Vasseur v. State*, 2021 VT 53, ¶ 7.

As a threshold matter, the City asserts that all of the new claims are premised on the existence of a landlord-tenant or other contractual relationship. It asserts further that in its November 1, 2021 decision, the court has already found that no such relationship exists. Thus, under the law of the case doctrine, the City asserts that the proposed amended complaint is futile because it fails to state a claim.

This argument, however, fails to acknowledge either the context of the court's prior decision or that decision's express limitation of its scope. That decision followed an evidentiary hearing on what the court interpreted as Plaintiffs' request for a preliminary injunction. The decision concluded that Plaintiffs had failed to adduce evidence sufficient to meet their burden of demonstrating standing to pursue their claims. The court took pains to limit the scope of its decision: "It may go without saying, but it nevertheless bears emphasis that this decision is made on Plaintiffs' request for a provisional remedy, and so is made based only on the evidence before the court at this time." *Grundy v. City of Burlington*, no. 21-CV-3247, 3 (Vt. Super. Ct. Nov. 1, 2021). The court expressed no opinion as to whether Plaintiffs had or could state a claim; indeed, the claim as then stated survived, and was later dismissed only because the single prayer for relief had become moot.

At the risk of again belaboring the obvious, different burdens apply to a request for a preliminary injunction and the determination whether a complaint states a claim. In the former context, "[t]he movant bears the burden of establishing that the relevant factors call for imposition of a preliminary injunction." *Taylor v. Town of Cabot*, 2017 VT 92, ¶ 19, 205 Vt. 586 (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). To state a claim, however, the "threshold a plaintiff must cross in order to meet our notice-pleading standard is such a low one, requiring only that pleadings contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.' " *Montague v. Hundred Acre Homestead, LLC*, 2019 VT 16, ¶ 10, 209 Vt. 514 (quoting

V.R.C.P. 8(a)) (other quotations and citation omitted). Thus, "[o]n a motion to dismiss, the court must assume that the facts pleaded in the complaint are true and make all reasonable inferences in the plaintiff's favor." *Id.*

Here, Plaintiffs allege in their Proposed Amended Complaint that they were tenants of the City with a right to possess 68 Sears Lane, and that the City violated their due process rights through a wrongful ejectment. Proposed Am. Compl. ¶¶ 45–46. While the court's earlier decision may suggest that Plaintiffs could have difficulty proving these allegations, at least at the pleading stage, the court must accept these allegations as true. Thus, to the extent the newly asserted claims rely on a tenancy, those allegations are sufficient under Rules 8(a) and 12(b)(6).

This conclusion, however, does not end the inquiry. The City does not rest its opposition exclusively on the preclusive effect of the court's earlier decision. Accordingly, the court examines each of Plaintiffs' new claims to assess the extent to which they assert colorable claims.

In their proposed Count I, Plaintiffs assert violations of their 4th Amendment rights "when Defendants seized and destroyed [their] property." Proposed Am. Complaint ¶ 47. The City opposes this amendment, asserting that Plaintiffs received due process prior to such seizure and destruction. It argues also that Plaintiffs have failed to allege a City policy or custom that deprived them of their rights, so as to allow municipal liability.

On the first of these arguments, the City relies on what it asserts to be sufficiency of notice. It points out that the Proposed Amended Complaint acknowledges that on two occasions, the City provided notice of the threatened removal action. Proposed Am. Compl. ¶¶ 25–26. It asserts also that the two notices "were part of the preliminary injunction proceedings" and so may be considered in assessing the sufficiency of the current allegations. This argument misses the mark, for several reasons. First, while the City filed copies of the notices in anticipation of the preliminary injunction hearing, they never became part of the record. Second, the notices on their face threaten removal actions on October 19 and October 26, 2021, respectively; it is at best questionable to what extent they provided sufficient notice of an action that occurred over a month later. Third, the notices describe a process for storage and reclaiming personal property; the Proposed Amended Complaint alleges, inferentially, that that process was not followed. Finally, to the extent that Plaintiffs may establish their right to the protections of Vermont landlord-tenant laws, the City's notices on their face do not comply with the notice requirements of those laws. *See* 9 V.S.A. § 4467. In short, the Proposed Amended Complaint sufficiently pleads a lack of due process prior to the removal and destruction of personal property.

The "policy or custom" argument is a bit more complicated. 42 U.S.C.A. § 1983 provides a right of action where a "person," under color of state law, subjects another person to the deprivation of any federal constitutional rights. A municipality can be liable under § 1983 "if the deprivation of the plaintiff's rights under federal law is caused by a governmental custom, policy, or usage of the municipality." *Matusick v. Erie Cnty. Water Auth.*, 757 F.3d 31, 62 (2d Cir. 2014); *see also Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690–91 (1978). A plaintiff may satisfy the "custom, policy, or usage" requirement in one of four ways:

> The plaintiff may allege the existence of (1) a formal policy officially endorsed by the municipality; (2) actions taken by government officials responsible for establishing the municipal policies that caused the particular deprivation in question; (3) a practice so consistent and widespread that, although not expressly authorized, constitutes a custom or usage of which a supervising policy-maker must have been aware; or (4) a failure by policymakers to provide adequate training or supervision to subordinates to such an extent that it amounts to deliberate indifference to the rights of those who come into contact with the municipal employees.

Brandon v. City of New York, 705 F. Supp. 2d 261, 276–77 (S.D.N.Y. 2010) (citations to numerous U.S. Supreme Court decisions omitted). The City takes issue with Plaintiffs' failure to explicitly "name any individuals or any policy," and asserts that "individual officer actions taken outside of city policy" cannot "form the basis for *Monell* liability." City's Reply at 3.

The City is correct that *Monell* liability does not arise from actions by individual officers taken outside of municipal policy. The U.S. Supreme Court has concluded, however, that "a final decisionmaker's adoption of a course of action 'tailored to a particular situation and not intended to control decisions in later situations' may, in some circumstances, give rise to municipal liability under § 1983." *Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 406 (1997) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986)); *see also Pembaur*, 475 U.S. at 481 ("If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood."). "[W]hether a particular official has "final policymaking authority" is a question of state law." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (emphasis omitted). While Plaintiffs may not know exactly who ordered the ejectment of Plaintiffs from 68 Sears Lane, the obvious implication is that a city official with final decision-making authority did so. *See*, *e.g.*, 24 app. V.S.A. ch. 3 § 36 ("The administration of all the fiscal, prudential, and municipal affairs of the City and the government thereof, except as herein otherwise provided, shall be vested in a principal officer to be styled the Mayor and a board of 12 members to be denominated the City Council."). Indeed, in its

Motion to Dismiss, the City asserts that its notices (and hence, inferentially, subsequent removal action) "were provided consistent with the City's Sheltering Policy." Mot. to Dismiss, 5. Plaintiffs are entitled to discovery to determine who in fact ordered the removal action and whether it was indeed undertaken pursuant to and consistent with that policy.

In Count II, Plaintiffs allege that the City "violated Article 11 when they seized Plaintiffs[']property without a warrant and should have known their conduct was illegal." Proposed Am. Compl. ¶ 51. Article 11 is self-executing, *Zullo v. State*, 2019 VT 1, ¶¶ 35–36, 209 Vt. 298, and does not rely on Section 1983 which, of course, applies only to violations of federal constitutional rights. *Id.* ¶ 42. The City makes no arguments specific to this claim; instead, its attack on the claim is lumped into its suggestion that "[b]y any measure, Plaintiffs had due process prior to removal." Mot. to Dismiss, 5. As noted above, however, the Proposed Amended Complaint sufficiently pleads a lack of due process. Plaintiffs explicitly allege that they "watched" as all their possessions "were destroyed by police." Proposed Am. Compl. ¶ 30. Surely, at least at the pleading stage, the court cannot conclude as a matter of law that the City's alleged immediate destruction of Plaintiffs' property was constitutionally sound. *Cf. Lavan v. City of Los Angeles*, 693 F.3d 1022, 1030 (9th Cir. 2012) ("by collecting and destroying Appellees' property on the spot, the City acted unreasonably in violation of the Fourth Amendment"). Thus, Count II also states a claim.

Counts III (false imprisonment) and IV (IIED) do not fare so well. These claims rest on the allegations that

> Defendant, unknown police officers, seized and destroyed Plaintiffs personal property. Specifically, Plaintiffs watched as police held his friends, other residents of the property, at the point of an assault rifle. Police cars a jersey barrier blocked both of 2 entrances to the property. Plaintiffs were held by police and forced to stay on the property for nearly 4 hours.
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> . . .
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> The actions of Defendants herein were wrongful and reflect a willful, malicious, intentional, outrageous, and reckless disregard to the rights of Plaintiffs, which caused Plaintiffs extreme mental suffering and acute mental distress . . . .

Proposed Am. Compl. ¶¶ 29, 33. There is neither allegation nor reasonable inference that these actions were taken pursuant to official custom, policy, or usage. Rather, these claims assert municipal liability for the conduct of unknown individual police officers.

"Under the settled doctrine of respondeat superior, an employer or master is held vicariously liable for the tortious acts of an employee or servant committed during, or incidental to, the scope of employment." *Brueckner v. Norwich Univ.,* 169 Vt. 118, 122–23 (1999). In such cases, however,

Vermont law has long recognized municipal immunity as a shield to liability. *See Morway v. Trombly*, 173 Vt. 266, 270 (2001) ("Municipal immunity is a common-law doctrine dating back to the mid-1800s in Vermont."). Thus, "[p]ursuant to well-established common law, a municipality is generally immune from suit based on the negligent performance of 'governmental' functions." *Civetti v. Turner*, 2020 VT 23, ¶ 6, 212 Vt. 185 (citing *Lorman v. City of Rutland*, 2018 VT 64, ¶ 9, 207 Vt. 598).

Vermont courts "have repeatedly found police work to be a governmental function." *Simuro v. Shedd*, 176 F. Supp. 3d 358, 371–72 (D. Vt. 2016); *see, e.g.*, *Franklin Cnty. Sheriff's Office v. St. Albans City Police Dep't*, 2012 VT 62, ¶ 17, 192 Vt. 188 (2012) ("[T]he provision of police services in Vermont . . . is a government function provided only by governmental entities for the benefit of the public."); *Carty's Adm'r v. Vill. of Winooski*, 78 Vt. 104, 108, 62 A. 45, 46 (1905) ("the police power . . . is a governmental function, founded upon the duty of the state to protect the public safety, the public health, and the public morals"). Counts III and IV are rooted in police conduct during the course of the removal action. *See* Proposed Am. Compl. ¶¶ 29, 53, 57. " '[A]bsent insurance coverage, those functions which are governmental are protected by the doctrine of sovereign immunity . . . .' " *Civetti* , 2020 VT 23, ¶ 8 (quoting *Lorman*, 2018 VT 64, ¶ 9). Thus, citing 29 V.S.A. § 1403, the court invited supplemental briefing on the existence and extent of the City's liability insurance coverage and its effect, if any, on the City's immunity. Upon reviewing the City's response (which included its insurance policy), it is apparent that the policy does not operate as a waiver of municipal immunity here. Accordingly, to the extent that these claims assert common law liability based on the doctrine of *respondeat superior*, they are barred by municipal immunity.

The Legislature, of course, has established an alternative to common law *respondeat superior* liability for the tortious conduct of municipal employees.

> When the act or omission of a municipal employee acting within the scope of employment is alleged to have caused damage to property, injury to persons, or death, the exclusive right of action shall lie against the municipality that employed the employee at the time of the act or omission; and no such action may be maintained against the municipal employee or the estate of the municipal employee.

24 V.S.A. § 901a(b). In such a case, "the municipality shall waive any defense not available to the municipal employee, including municipal sovereign immunity." *Id.* § 901a(c). Critically, however, Section 901a "shall not apply to an act or omission of a municipal employee that was willful, intentional, or outside the scope of the employee's authority." *Id.* § 901a(e).

Counts III and IV clearly fall outside the scope of Section 901a. False imprisonment is the "unlawful restraint by one person of the physical liberty of another." *State v. May*, 134 Vt. 556, 559

(1976) (quotations omitted). Traditionally, one is liable for false imprisonment if: "(a) he acts intending to confine the other or a third person within boundaries fixed by the actor, and (b) his act directly or indirectly results in such a confinement of the other, and (c) the other is conscious of the confinement or is harmed by it." Restatement (Second) of Torts § 35(1) (1965). Similarly, it has long been the law that a claim for IIED must demonstrate "outrageous conduct, done intentionally or with reckless disregard of the probability of causing emotional distress, resulting in the suffering of extreme emotional distress, actually or proximately caused by the outrageous conduct." *Sheltra v. Smith,* 136 Vt. 472, 476 (1978). Plaintiffs' Proposed Amended Complaint parrots these elements, alleging conduct that reflected "willful, malicious, intentional, outrageous, and reckless disregard to the rights of Plaintiffs." Thus, while Plaintiffs' allegations clearly state claims for false imprisonment and IIED, they fall equally clearly within the exception set forth in Section 901a(e). *See Simuro v. Shedd*, 176 F. Supp. 3d at 373 ("[B]ecause Section 901a(e) plainly excludes 'willful' and 'intentional' acts from the scope of the statute's mandate, [the municipality] does not assume [officer's] place in [] claims for false arrest, malicious prosecution, and intentional infliction of emotional distress under Section 901a(b).") Accordingly, 24 V.S.A. § 901a does not effect a waiver of municipal immunity for these claims.

In their "Opposition to Defendant's Motion to Dismiss," Plaintiffs suggest that 24 V.S.A. § 901 offers a path around municipal immunity. In this regard, they analogize their case to *Civetti v. Turner*, 2020 VT 23, 212 Vt. 185. The analogy fails, however. Significantly, the exception to immunity recognized in that case was for municipal "officers," as distinguished from employees. *Id.* ¶¶ 16–22; 24 V.S.A. § 901(a) (expressly applying to "any appointed or elected officer"). Claims against "municipal employees," in contrast, are governed by Section 901a. Moreover, the Court in *Civetti* recognized the question there as "whether, pursuant to either 24 V.S.A. § 901 or § 901a, the Legislature has waived municipal immunity for the negligent actions of municipal officers or employees while performing governmental functions." *Id.* ¶ 12. Here, in contrast, the question is whether either section waives immunity for intentional torts. Section 901a clearly answers that question in the negative. To the extent that Section 901 could be read as suggesting otherwise, Section 901a, as the more-recently enacted statute, speaking expressly to the question, controls. *See Athens Sch. Dict. V. Vermont State Bd. Of Ed.*, 2020 VT 52, ¶ 30, 212 Vt. 455 ("specific and more recent statutes regarding the same subject matter control over more general and older statutes"). [2]

[2] To the extent that Section 901(b) could be read as retaining municipal immunity only for actions made with "malicious intent" and waiving immunity for non-malicious intentional acts, the court notes that Plaintiffs have explicitly pled malice. Proposed Am. Compl. ¶ 33.

ORDER

The court grants the motion to amend in part and denies it in part. Plaintiffs may file and serve an amended complaint adding other former occupants of the Sears Lane encampment and asserting Counts I and II as set forth in the Proposed Amended Complaint. The court denies leave to amend to assert Counts III and IV of that paper.

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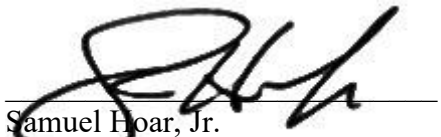

Samuel Hoar, Jr.
Superior Court Judge