SUPERIOR COURT
Washington Unit
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CIVIL DIVISION
Case No. 22-CV-04598

Mark Marsden v State of Vermont et al

Ruling on Defendants' Motion to Dismiss

In this case, Plaintiff Mark Marsden, *pro se*, seeks damages against a State Police officer and the State for time he spent in jail related to a charge of criminal threatening that the State's Attorney eventually voluntarily dismissed. Mr. Marsden's initial complaint was exceptionally vague and did not identify any legal claims. Defendants sought, and the Court ordered, a more definite statement of the claims. Mr. Marsden responded with a filing that, in large part, still fails to provide full notice of the claims being raised as provided by Vt. R. Civ. P. 8. Rather than attempting further steps to clarify Mr. Marsden's claims, Defendants then filed the instant motion to dismiss.

In seeking dismissal, Defendants have attempted to surmise the claims being brought. They have suggested that Mr. Marsden is claiming false arrest and imprisonment, negligence, and violation of the right to a speedy trial. In his opposition filing, Mr. Marsden affirms this nominal characterization of his claims. *See* Mr. Marsden's Opposition to Dismissal at 2 (filed May 25, 2023). These legal claims remain labels more than anything else, however, insofar as Mr. Marsden has not asserted cogent factual allegations in support of them. Indeed, while he clearly accuses the underlying complaining witnesses of lying, and he blames his criminal defense attorney for ignoring his instructions as to his criminal case, he nowhere cogently alleges particular wrongful

conduct of Defendant LeClair or any other state actor. This extreme vagueness as to Mr. Marsden's claims presents a substantial impediment to addressing reliably at the pleading stage the largely substantive reasons argued by the State in support of dismissal.

The narrative Mr. Marsden asserts in his filings, to the extent the Court can discern it, is as follows. In 2019, he had some kind of contact with his sister and her brother-in-law. The police were called, and Corporal Amy LeClair of the Vermont State Police responded. Officer LeClair eventually assembled witness statements, interviewed Mr. Marsden, and concluded that there was probable cause to charge Mr. Marsden with criminal threatening.[1] According to Mr. Marsden, the complaining witnesses had lied to Officer LeClair and no criminal activity had occurred. At some point he was arrested, presumably by Officer LeClair.

Mr. Marsden was charged with criminal threatening (and possibly aggravated disorderly conduct), and the criminal court found probable cause. Mr. Marsden asserts that he was thrown in jail.[2] While in jail, he refused to engage in plea negotiations and resisted any efforts by his counsel to get the charge dismissed, insisting to her that he wanted to go to trial in a speedy fashion, presumably to prove his innocence. He asserts that his attorney ignored all such direction from him, and he languished in jail. He

[1] Mr. Marsden also mentions a charge of aggravated disorderly conduct. It is unclear if that charge is related to this case in any material way.

[2] He mentions in places that he had been on furlough. The Court infers that he was placed in or remained in jail for having violated furlough conditions, whether for having been charged with or committing a new crime or for some other reason relating to that incident.

asserts that, at some point while the charges remained pending, Officer LeClair was supposed to show up for something—he does not say what—but she did not. The State's Attorney eventually voluntarily dismissed the case because the complaining witnesses could no longer be located, Officer LeClair had retired and moved out of state, and he apparently came to believe resources would be better spent elsewhere. At some point later, Mr. Marsden again was released to the community. He is currently not in jail.

Defendants seek dismissal. As for false arrest and imprisonment, they argue that probable cause is a complete defense, and under *Lay v. Pettengill*, 2011 VT 127, 191 Vt. 141, the criminal court's finding of probable cause is binding in this case. They argue that any negligence claim against Officer LeClair is statutorily barred, and any such claim against the State is subject to the discretionary function exception to the State's waiver of sovereign immunity under the Vermont Tort Claims Act, 12 V.S.A. §§ 5601–5606.[3] As for the speedy trial claim, Defendants argue that the State cannot be sued for damages under 42 U.S.C. § 1983, and no personal involvement of Officer LeClair is alleged as to any such violation.

The Vermont Supreme Court has described the familiar standard for Rule 12(b)(6) motions to dismiss for failure to state a claim as follows:

> "A motion to dismiss . . . is not favored and rarely granted." This is especially true "when the asserted theory of liability is novel or extreme," as such cases "should be explored in the light of facts as developed by the evidence, and, generally, not dismissed before trial because of the mere novelty of the allegations." In reviewing a motion to dismiss, we consider whether, taking all of the nonmoving party's factual allegations as true, "'it appears beyond doubt' that there exist no facts or circumstances that would

[3] To the extent that the State very briefly touches on whether there was any actionable duty to support a negligence claim, the Court declines to address that matter. Without some kind of identification as to what the negligent act was, the Court declines to opine on whether doing it violated a duty someone owed to Mr. Marsden.

> entitle the plaintiff to relief." We treat all reasonable inferences from the complaint as true, and we assume that the movant's contravening assertions are false.

Alger v. Dep't of Labor & Indus., 2006 VT 115, ¶ 12, 181 Vt. 309, 316–17 (citations omitted). The Court analyzes what appear to be Plaintiff's claims under that standard.

I. False Arrest and Imprisonment

"The gravamen of a claim for false imprisonment or false arrest is an unlawful detention."[4] 35 C.J.S. False Imprisonment § 2 (citations omitted). Defendants assert that probable cause is a complete *defense* to a constitutional or state law claim of false arrest and false imprisonment, citing *Kucera v. Tkac*, No. 5:12-CV-264, 2014 WL 6463292, at *8 (D. Vt. Nov. 17, 2014). They further assert that because the criminal court found probable cause, that determination is binding in this case due to the presumption described in *Lay v. Pettengill*, 2011 VT 127, ¶ 22, 191 Vt. 141, 153.

The Court declines to go down this road in the current posture of this case. *Lay* did not involve a claim of false arrest or imprisonment. The claim in *Lay* was for the related but fundamentally different tort of malicious prosecution, which by all accounts is not asserted here. The absence of probable cause is an element of a malicious prosecution claim. *See* Dan B. Dobbs et al., The Law of Torts § 44 (2d ed.) ("The malicious prosecution plaintiff must affirmatively prove that the defendant prosecuted without probable cause to do so and prosecuted in bad faith."). It is not an element of a false imprisonment claim. *See id.* § 41. Thus, false imprisonment claims typically turn

[4] Mr. Marsden does not allege facts supporting any inference that he was unlawfully detained, but Defendants do not seek dismissal on that basis.

on the defendant's privilege or defense. *Id.* As Defendants themselves expressly note, probable cause is a *defense*.

Affirmative defenses cannot be considered on a motion to dismiss for failure to state a claim unless they are indicated by and clearly appear on the face of the complaint. *See* 5B Wright & Miller, Fed. Prac. & Proc. Civ. § 1357 (3d ed.). Indeed, the decision on which Defendants principally rely, *Kucera*, arose under Rule 56 (summary judgment), as did *Lay*, not Rule 12(b)(6) (failure to state a claim).

Defendants' asserted affirmative defense of probable cause does not clearly enough appear on the face of the complaint. Assuming the presumption of probable cause described in *Lay* eventually could prevail in this case, the Court notes that *Lay* also arose under Rule 56 procedure and the circumstances relevant to the presumption (and collateral estoppel) there were clear in the factual record. That is not the case here.

At this juncture, and without prejudice, the Court declines to dismiss based on the assertions of probable cause.

II. Negligence

To the extent that Mr. Marsden has attempted to assert negligence, he does not specify any particular negligent act. The Court infers that Mr. Marsden means to claim either (a) that Officer LeClair should have done something differently in her investigation or (b) that something about her failure to show up for something was negligent.

As asserted against Officer LeClair, any such claim is statutorily barred by 12 V.S.A. § 5602(a), which provides: "When the act or omission of an employee of the State acting within the scope of employment is believed to have caused damage to property,

injury to persons, or death, the exclusive right of action shall lie against the State of Vermont; and no such action may be maintained against the employee or the estate of the employee." As a result, the negligence claim against Officer LeClair is dismissed.[5]

Considering the negligence claim against the State, it argues only that its sovereign immunity is preserved under the discretionary function exception, 12 V.S.A. § 5601(c)(1). This exception shields the State from any claim "based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a State agency or an employee of the State, whether or not the discretion involved is abused." *Id.* "The purpose of the discretionary-function exception is to assure that courts do not invade the province of coordinate branches of government through judicial second guessing of legislative or administrative policy judgments." *Lorman v. City of Rutland*, 2018 VT 64, ¶ 13, 207 Vt. 598, 608 (citation omitted). To determine if the exception properly applies, the Court first determines whether the "challenged act" involves an "element of judgment or choice" and, if so, whether that judgment is based on public policy considerations and thus falls within the intended scope of the exception. *See Searles v. Agency of Transp.*, 171 Vt. 562, 563 (2000).

The State essentially argues that it is obvious in this case that any investigation undertaken by Officer LeClair would involve an element of judgment or choice and that

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[5] There is an exception to this statutory bar for claims of gross negligence. 12 V.S.A. § 5602(b). Mr. Marsden makes no such claim in this case, however. Nor can any of the allegations gleaned from the amended complaint potentially meet that high standard. "Gross negligence is negligence that is more than an error of judgment; it is the failure to exercise even a slight degree of care, owed to another." *Crogan v. Pine Bluff Ests.*, 2021 VT 42, ¶ 29, 215 Vt. 50, 63 (citation omitted). Since no gross negligence claim has been pled, however, the Court makes no ruling regarding the viability of such a cause of action should Plaintiff attempt to raise it through the amendment process. Vt. R. Civ. P. 15.

judgment would be properly treated as based on public policy considerations for purposes of the exception.

The fundamental problem with the State's argument in this case is that the discretionary function analysis focuses on the "challenged act." Other than generally suggesting that the claim somehow arises out of Officer LeClair's investigation, neither it nor Mr. Marsden identifies the challenged act at issue. While some governmental investigations fall within the discretionary function exception, *see, e.g., Ingerson v. Pallito*, 2019 VT 40, ¶¶ 18-26, 210 Vt. 341, 352–57, the State has not come forward with authority providing that *all* investigations by police necessarily fall within the discretionary function exception. Indeed, the caselaw suggests the opposite. *See Kennery v. State*, 2011 VT 121, ¶ 36, 191 Vt. 44, 62 (negligent welfare check does not fall within discretionary function exception).

On this record, the Court declines to hold that the allegations of the complaint demonstrate, as a matter of law, that the State retains sovereign immunity under the discretionary function exception. As *Kennery* explains, if this matter is raised on summary judgment, Mr. Marsden will be obliged to "allege facts sufficient to support a finding that the challenged act is not the type of act protected by the exception." *Id.*, 2011 VT 121, ¶ 33, 191 Vt. 44, 61 (*quoting Johnson v. Agency of Transp.*, 2006 VT 37, ¶ 6, 180 Vt. 493, 494)).[6]

To the extent that the alleged negligence somehow arises out of Officer LeClair missing some kind of appearance she was supposed to make in Mr. Marsden's criminal

[6] Further complicating the analysis of the discretionary function exception at the pleadings stage is the fact that the State is also required to prove that is has not waived its immunity through the purchase of insurance. 12 V.S.A. § 5601(f).

case, he does not explain what it was or how it could have had any constitutional or tortious impact on him. Nor is any such impact reasonably inferable in the allegations. Ordinarily, if a witness fails to appear in court, that would be dealt with in the underlying proceedings. The Court perceives no actionable claim on this basis, and if any such claim is asserted, it is dismissed.

III. Speedy Trial

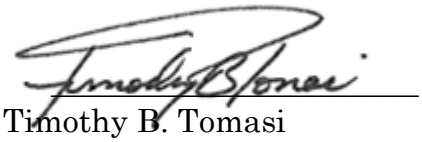
Plaintiff sues both Defendants under 42 U.S.C. § 1983, claiming that they are responsible for failing to bring his case to trial in accord with his speedy trial rights under the federal Constitution. Liability under § 1983, however, depends on the defendant's "personal involvement" in the asserted deprivations of rights. *See Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994) (noting that personal involvement requirement is "well settled"). While the amended complaint notes that Officer LeClair arrested him, prosecutions in the State of Vermont are brought and litigated by a State's Attorney or the Vermont Attorney General. As such, the amended complaint fails to allege that Officer LeClair had any personal involvement in any alleged deprivation of Mr. Marsden's rights that could support a claim under 42 U.S.C. § 1983. The § 1983 against Officer LeClair is dismissed.

As to the § 1983 claim against the State, it fails as a matter of law. Damages claims are not permissible under 42 U.S.C. § 1983 against a state as it is not a "person" that might be sued under that statute. *Accord Will v. Michigan*, 491 U.S. 58, 71 (1989); *Heleba v. Allbee*, 160 Vt. 283, 286 (1992). The § 1983 claim against the State is dismissed.

Order

For the foregoing reasons, Defendants' motion to dismiss is granted, in part, and denied, in part. The negligence claim against Officer LeClair is dismissed, the negligence claim against the State regarding Officer LeClair's failure to appear is dismissed, and the § 1983 claims are dismissed. The motion to dismiss is denied as to the remaining claims.

Electronically signed on Wednesday, July 26, 2023, pursuant to V.R.E.F. 9(d).



Timothy B. Tomasi
Superior Court Judge