

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CHESTER AND NADIA SMALKOWSKI,)	
et al.,)	
Plaintiffs,)	
)	
v.)	Case No.: CIV-06-845-M
)	
HARDESTY PUBLIC SCHOOL)	
DISTRICT, et al.)	
)	
Defendants.)	

DEFENDANTS KOCH AND HARDESTY’S REPLY TO PLAINTIFFS’ RESPONSE TO THESE DEFENDANTS’ MOTION TO DISMISS

COME NOW the defendants Guy Koch and the Town of Hardesty and submit this reply to plaintiffs’ response to these defendants’ motion to dismiss, having been granted leave to do so by the Court’s Order of October 2, 2006. (Doc. 34)

PROCEDURAL POSTURE

Plaintiffs filed their complaint on August 11, 2006, (Doc. 1), and these defendants moved to dismiss all claims, pursuant to Fed.R.Civ.P. 12(b)(6). (Doc. 12) Plaintiffs timely filed a response in opposition to these defendants’ motion, (Doc. 31), and these defendants have been granted leave to file a reply.

ARGUMENTS AND AUTHORITIES

PROPOSITION I. PLAINTIFFS’ CONFUSION OVER THE TYPE OF MOTION SUBMITTED BY THESE DEFENDANTS DOES NOT UNDERMINE THE FACT THAT THEIR ALLEGATIONS ARE INSUFFICIENT.

Plaintiffs’ response brief makes several remarks regarding a purported deficiency of these defendants’ initial motion to dismiss; i.e., that it was submitted “without any evidence - no

documents, no photographs, no testimony, no transcripts, no Affidavits - nothing!" (Doc. 31, p. 1) Plaintiffs also remark that "Defendants have not listed ANY undisputed facts." Plaintiffs state that defendants have "confessed" the "facts of the complaint," somehow obligating the Court to "convert" the Rule 12(b)(6) motion to one for summary judgment. (Doc. 31, p. 2)¹

The better course is to disregard Plaintiffs' efforts to supplement their complaint. As the Court is well aware,

[t]he 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.

Federal Practice and Procedure, Wright & Miller, § 1356. See also, Pirraglia v. Novell, Inc., 339 F.3d 1182 (10th Cir. 2003) (Court's function is not to weigh potential evidence, but to assess whether plaintiff's complaint alone is legally sufficient to state a claim); accord, County of Santa Fe, New Mexico v. Public Service Company of New Mexico, 311 F.3d 1031 (10th Cir. 2002).

These defendants' motion demonstrated why the facts alleged in plaintiffs' initial complaint were insufficient to support any of the theories raised. The response should be rejected.

PROPOSITION II: PLAINTIFFS' "STATEMENT OF UNDISPUTED FACTS" AND THE SUBMITTED AFFIDAVIT DO NOT ESTABLISH A CAUSE OF ACTION IN ANY EVENT.

Plaintiffs' brief contains a "statement of undisputed facts." This "statement" is based entirely on an affidavit of Nadia Smalkowski. (Doc. 31, Attachment 1, Exh. A). None of the remarks in the

¹There is authority that when a court considers matters outside the pleadings a court converts a motion to dismiss to one for summary judgment. Price v. Philpot, 420 F. 3d 1158, 1167 (10th Cir. 2005). The Tenth Circuit has also recognized that a court may not consider evidence outside the pleadings without making such a conversion. Jackson v. Integra, Inc., 952 F. 2d 1260, 1261 (10th Cir. 1991). However, if it is to consider material outside the pleadings, the court must give notice of its intent to do so. Price, supra.

affidavit correspond to any allegation in the complaint. Even so, the new “facts” are insufficient to demonstrate a cause of action. The following is an analysis of the “facts” set forth in the response brief. (Doc. 31, pp. 2-4):

1. Plaintiffs now claim that Koch told the school how to banish all plaintiffs from its property. This claim is not in the complaint. Instead, the complaint describes two incidents which occurred at basketball games; the first on November 19, 2004; and, the second on November 21, 2005 (Doc. 1, ¶¶ 22, 32). Neither of these paragraphs says anything about Koch influencing the school. Even if paragraph 13 to the affidavit is true, the fact that Koch “conspired with Defendant School Board members” on how to keep plaintiffs off of school property, does not establish anything. Such a fact, if true, would not establish any theory alleged. A §1983 conspiracy claim requires (1) an agreement between defendants to commit an illegal act: and, (2) an actual deprivation of constitutional rights. Cinel v. Connick, 15 F. 3d 1338, 1343 (5th Cir. 1994). Mere allegations of conspiracy are not enough. Tonkovich v. Kansas Bd. of Regents, 159 F. 3d 504, 533 (10th Cir. 1998), after remand, 254 F. 3d 941. Neither an illegal act or constitutional deprivation are identified by the affidavit.

2. Plaintiffs now state Koch gave advice on how to banish plaintiffs from the school and then assisted Buckley in preparing a statement for a police report. Plaintiffs now say Koch refused to submit a statement of Chester Smalkowski until some time after Buckley’s statement was submitted. These “facts” are not in the complaint. These “facts” do not establish anything. They do not go to the substance of any of plaintiffs’ legal theories, nor do they rebut the legal arguments in these defendants’ motion.

3. For the first time, plaintiffs say Koch pressured other students into making accusations regarding a minor plaintiff. This is not in plaintiffs' complaint. Even if this did occur, no constitutional deprivation by Koch occurred. To the extent "fact no. 3" of the response brief states that Koch "slandered" the family, plaintiffs have failed to allege compliance with the notice provisions of Oklahoma's Governmental Tort Claims Act, 51 O.S. §§ 156, 157, a necessary prerequisite to this Court having jurisdiction for any tort theory. Gurley v. Memorial Hospital of Guymon, 1989 OK 34, 770 P. 2d 573 (notice is condition precedent to suit against political subdivision).²

4. Plaintiffs' fourth "fact" does not establish anything. If Koch violated an order of sequestration, the appropriate remedy would have been to challenge his testimony at the criminal trial. Similarly, if Koch gave false testimony at the criminal trial, the jury was present to give such weight to it as it thought fit. The complaint states Chester Smalkowski was acquitted of the criminal charges against him. Even if Koch gave false testimony, there was no harm due to acquittal.

5. The "facts" at heading number 5 of plaintiffs' brief do not establish anything. Again, if Koch is sued for "spreading malicious rumors" and "defamation," plaintiffs have failed to comply with the Tort Claims Act. Any such claim is not properly before the Court.

6. Plaintiffs allege, for the first time, that Koch knew co-defendant Fuentes had hired a "hit man" to harm the family in a "murder for hire" scheme. This sordid story is not found in the complaint. Even if such an allegation were true, and it is not, Koch's failure to protect the family from a "murder for hire" scheme is not actionable, as discussed at Proposition III, *infra*.

²Hardesty has no record of Plaintiffs submitting a tort claim notice under Okla. Stat. tit. 51 §§ 156, 157.

7. Plaintiffs' new "fact" that there have been additional threats against them and that Koch has refused to "protect the family," are not in the complaint. Even if this occurred, it is not an actionable wrong by Koch. He has no duty to protect plaintiffs from anyone, as discussed at Proposition III, *infra*.

The affidavit of Nadia Smalkowski establishes nothing with respect to any cause of action. All "facts" in the affidavit are new contentions not fairly raised by the complaint. As such, the affidavit should be disregarded. Even if the affidavit is considered, the "new" facts do not demonstrate the existence of any cause of action.

PROPOSITION III: PLAINTIFFS' ARGUMENTS ARE INSUFFICIENT TO SHOW WHY HARDESTY AND KOCH'S MOTION TO DISMISS SHOULD NOT BE SUSTAINED.

Plaintiffs' first substantive remark regarding the arguments in defendants' brief is that these defendants' "participation, encouragement and acquiescence" and the acts of others makes them proper defendants. (Doc. 31, p. 4). This remark completely misses the point of defendants' motion. There, Koch and Hardesty show that no action alleged to have been committed by Koch was wrongful. Similarly, the motion demonstrated that plaintiffs had no loss from any act which they alleged Koch committed.

Plaintiffs contend the motion should be "denied" because "Defendants are trying to use a 12(b)(6) Motion to argue the facts. . . ." (Doc. 31, p. 5). Defendants' motion relied upon nothing but the "facts" disclosed in plaintiffs' complaint. The gist of the motion, appropriate under Rule 12(b)(6), is that the facts alleged are insufficient to state a cause of action against these defendants. See, generally, Thompson v. Illinois Dept. Of Professional Regulation, 300 F. 3d 750, 753-54 (7th Cir. 2002) (plaintiff cannot avoid argument that facts alleged show plaintiff is not entitled to relief).

FIRST AMENDMENT Defendants made several arguments regarding plaintiffs' First Amendment claim: first, the specific allegations against Koch – that he withheld investigative reports regarding the school's "pretext" for suspending NS, that co-defendant Fuentes spoke to him, and that he had conspired with Buckley to interfere with judicial process – were not sufficient to demonstrate a First Amendment violation; and, second, none of the incidents described show that any plaintiff suffered an actionable harm because of anything Koch did.³

Plaintiffs now contend they have a viable First Amendment theory because, for the first time, the affidavit says that Koch advised the school on how to banish the plaintiffs from school property and that the school followed his advice. (Doc. 31, p. 5). Neither allegation is contained in the complaint. Even if the affidavit testimony is truthful, and it is not, the "evidence" does not show any actionable harm.

Neither do the purported "damages" listed at page 6 of plaintiffs' response brief show actionable harm caused by Koch. This is so because: (a) if N.S. missed two years of high school basketball, there is no allegation that Koch caused her to miss it; (b) if N.S. has missed one prom, there is no allegation that Koch caused her to miss it – instead, plaintiffs admit that they withdrew their children from school (Doc. 1, ¶ 37); (c) if N.S. has missed one or two years of attendance, there is no allegation that Koch caused her to miss it – instead, plaintiffs admit they withdrew their children (Doc. 1, ¶ 37); (d) the same is true for C.S. – any missed school is because of plaintiffs' choice to withdraw, not any action of these defendants; (e) while Chester Smalkowski was arrested and charged with a misdemeanor and a felony, it is beyond dispute that the arrest and prosecution

³ Page 10 of defendants' brief contains typographical errors. Defendants erroneously cited Okla. Stat. Tit. 51 § 24 A.9(b) when the reference should have been to § 24A.8(b). Similarly, Sanchez v. Altus, 433 F.3d, 1294, 1314-16 is a 2006 opinion, not 2005.

were due to privileged actions of the District Attorney, in her prosecutorial role, and the District Court; and, in any event, Smalkowski was acquitted; (f) the expenditure of funds defending a criminal case is not a compensable item of damages unless the prosecution was wrongful. Here, the Court can take judicial notice of the fact that the District Court of Texas County found that probable cause existed sufficient to make it reasonably probable to believe that Chester Smalkowski committed a crime and that a warrant should issue for his arrest, thus eliminating any Fourth Amendment claim that any action occurred without “probable cause,” that Smalkowski was “falsely arrested” or “maliciously prosecuted” (www.odcr.com; Texas County Case No. CF 04-335, warrant issued 12/28/04; CM 04-463, warrant issued 11/29/04); (g) even if the entire family has been threatened by persons known to all defendants, this claim is not actionable against these defendants. Neither is there any allegation to this effect in plaintiffs’ complaint; (h) if employees of the family business have been “threatened and run off” this is a new claim not contained within the complaint; and, (i) if these defendants spread “false rumors” about the family, this is a new claim not contained within the complaint and, in any event, would constitute a “tort” cause of action. Such a theory fails because plaintiffs have not complied with the notice provisions of Oklahoma’s Governmental Tort Claims Act. 51 O.S. § 156, 157.

FOURTH AMENDMENT Plaintiffs’ attempt to state they have properly alleged a Fourth Amendment claim because their “undisputed facts” show that Koch knew the school principal was the aggressor in the altercation with Chester Smalkowski. This allegation is new and not contained within the complaint. Further, plaintiffs’ statement that Koch manipulated reports to make it appear that Smalkowski was the appropriate suspect instead of Buckley and that this “fact” is established by the jury’s verdict, is nonsense. All the Texas County jury found in acquitting

Chester Smalkowski was that the State had failed to prove, beyond a reasonable doubt, that Mr. Smalkowski committed the felony offense. This is a very different standard than the burdens confronting plaintiffs in this case and the decision is not binding on these defendants in any event. See, Kinslow v. Ratzlaff, 158 F.3d 1104, 1105 (10th Cir. 1998) (State Criminal Court's finding of illegality of search did not bar officers from raising probable cause defense in subsequent § 1983 litigation when officers were not parties in the State Court action). Here, neither Hardesty nor Koch were parties to the State court prosecution. The jury's verdict only determined that the State had failed to establish Smalkowski's guilt beyond a reasonable doubt. Plaintiffs' remarks regarding the sufficiency of their Fourth Amendment claim are inadequate to show that these defendants' motion should not be sustained.

FIFTH AMENDMENT

Plaintiffs concede that they have no response to these defendants' arguments that the Fifth Amendment claim is deficient.

EQUAL PROTECTION

Defendants' motion to dismiss the equal protection claim demonstrated that Koch was not alleged to be a "decision maker" in the process by which Chester Smalkowski came to be prosecuted, nor in the School Board's decisions with respect to the minor plaintiff, N.S. Also, the motion demonstrated that there was no allegation of "different treatment" by Koch. Plaintiffs' response, once again, raises assertions not found in the complaint. Now, for the first time, plaintiffs contend there was a "murder for hire" scheme by a co-defendant and that the district attorney in Texas County purportedly told someone that "no one ever gets an acquittal against my office." (Doc. 31, p. 8). Neither of these remarks has anything to do with Guy Koch. Neither can they show that Koch's actions violated Plaintiffs' rights to equal protection under the law.

SIXTH, EIGHTH AND NINTH AMENDMENT CLAIMS

Plaintiffs respond by

stating that the Sixth Amendment guarantees a person the right to confront witnesses. True enough, but plaintiffs' contention Koch refused to take statements from favorable witnesses does not show a potential violation of a right to confront witnesses "against" Smalkowski. Similarly, plaintiffs' remarks regarding the Eighth Amendment do not affect Koch. Whether the District Attorney raised Chester Smalkowski's bond does not show Koch set an excessive bond or fine.

Finally, plaintiffs say their Ninth Amendment claims are for "slander, assault, battery, tortious interference, malicious prosecution, excessive force." These are tort claims not alleged against these defendants in the complaint. Neither is there any allegation that plaintiffs complied with the jurisdictional notice provisions of the Governmental Tort Claims Act, 51 O.S. § 151, et. seq.

TITLE IX Plaintiffs contend they "have alleged a violation of Title IX purely as a jurisdictional claim." Defendants do not know what this means. These defendants' motion showed that Title IX is a basis only for "gender discrimination" claims. There is no gender discrimination alleged in this suit. The Title IX theory should be dismissed.

MUNICIPAL LIABILITY UNDER 42 U.S.C. § 1983 Defendants' motion demonstrated that Hardesty may not be liable under 42 U.S.C. § 1983 without a showing its officer committed a constitutional wrong. Plaintiffs' allegations are insufficient to show that Koch violated any constitutional right. The civil rights claims against Hardesty should be dismissed.

Plaintiffs' response brief states that Koch knew of a "murder for hire" scheme and did not protect the Plaintiffs. This is not in the complaint. Even if it were, it does not state a cause of action. State actors are generally liable only for their own acts and not for the acts of third parties. Armijo v. Wagon Mound Public Schools, 159 F.3d 1253 (10th Cir. 1998) (school officials not liable for

sending teenage student home alone when he committed suicide); Liebson v. New Mexico Corrections Department, 75 F.3d 274, 276 (10th Cir. 1996) (state correction officials are not liable for kidnaping and sexual assault of prison librarian by inmate). The United States Supreme Court has noted that nothing in the language of the due process clause itself requires the State to protect the life, liberty and property of citizens against invasions by private actors. DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 195, 109S.Ct. 998, 103 L. Ed.2d 249 (1989).

The two exceptions to this rule occur where: (1) there is a “special relationship” between a State actor and an individual such that the State maintains sufficient control to prompt an affirmative duty to protect; and (2) if the State actor is involved in creating an actual danger which harms the individual claimant. See, Armijo, 159 F.3d at 1260. Neither the complaint nor the affidavit show Hardesty or Koch had a “special relationship” or “created a danger” for the Smalkowskis which harmed them. There is nothing to show that Koch or Hardesty had any duty to protect any plaintiff from anyone or anything. The newly described “murder for hire” by some stranger is insufficient to state any cause of action against these defendants.

CONCLUSION

For the above stated reasons, as well as those mentioned in these defendants’ initial motion to dismiss, the plaintiffs’ complaint against Koch and Hardesty should be dismissed.

Respectfully submitted,

s/ David W. Kirk

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CERTIFICATE OF SERVICE

This is to certify that on this 10th day of October, 2006, a true and correct copy of the above and foregoing was electronically transmitted to the Clerk of the Court using the ECF System for filing and transmittal of Notice of Electronic Filing to the following registrants:

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