

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JEREMY BANKS,

Plaintiff,

v.

Case No: 3:14-cv-65-J-39MCR

**RUSTY RAY RODGERS, an individual
and FLORIDA DEPARTMENT OF LAW
ENFORCEMENT,**

Defendants.

ORDER

Defendant has moved the Court (Doc. 16) to dismiss Plaintiff's Amended Complaint (Doc. 12). Plaintiff has responded in opposition (Doc. 18).¹ As such, both parties have submitted memoranda in support of their respective positions, and the matter is now ripe for the Court's consideration. Plaintiff has alleged five (5) claims for relief against Defendant Rogers.²

Counts I, II and III are claims pursuant to 42 U.S.C. § 1983 for unlawful search and seizure and providing false information to obtain a search warrant, unlawful detention or false arrest, and malicious prosecution, respectively. Counts V and VI are claims under

¹ Plaintiff's memorandum in opposition exceeds the page limitation of Local Rule 3.01(b).

² Plaintiff's Amended Complaint alleges a sixth claim (Count IV) and seventh claim (Count VIII) against the Florida Department of Law Enforcement for false arrest and Negligent Retention / Supervision, respectively.

Florida common law for malicious prosecution and intentional infliction of emotional distress.

Plaintiff Banks' claims arise from the tragic death of Michelle O'Connell, Plaintiff's girlfriend, on September 2, 2010 (Doc. 12, ¶ 6). Plaintiff, a St. Johns County Sheriff's Office deputy was the subject of a Florida Department of Law Enforcement (FDLE) investigation into Ms. O'Connell's death conducted by Defendant Rogers as an agent of FDLE. (Doc. 12, ¶¶ 9, 10). Despite a medical examiner's report finding suicide to be the manner of Ms. O'Connell's death, Defendant Rogers conducted an investigation which targeted Plaintiff Banks as criminally culpable in Ms. O'Connell's death. (Doc. 12, ¶¶ 7, 10). The ways and means employed by Defendant Rogers in conducting that investigation comprise the gravamen of Plaintiff's claims.

Plaintiff's § 1983 claims are founded upon an absence of probable cause for Defendant Rogers' search and seizure of Plaintiff's property (Doc. 12, ¶¶ 16 – 28); for his detention or unlawful arrest of Plaintiff (Doc. 12, ¶¶ 29 - 38); and for his efforts to have Plaintiff prosecuted (Doc. 12, ¶¶ 39 – 52). Each of the claims of Plaintiff's Complaint have in common an allegation that Defendant Rogers' actions under color of law were without probable cause.³

³ The Eleventh Circuit has explained the probable cause inquiry as follows:

In order for probable cause to exist an arrest [must] be objectively reasonable under the totality of the circumstances. This standard is met when the facts and circumstances within the officer's knowledge, of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances shown that the suspect has committed, is committing or is about commit an offense. Probable cause requires more than mere suspicion, but does not require convincing proof. In determining whether probable

Although the well pleaded allegations of the complaint must be taken as true, a complaint fails to state a claim upon which relief may be granted if it fails to include "a short and plain statement of the claim showing that the pleader is entitled to relief." Harper v. Lawrence Cnty., Ala., 592 F.3d 1227, 1232-33 (11th Cir. 2010) (Citing the appropriate abbreviation for federal rule of civil procedure 8(a)(2), 12(b)(6)). To avoid a dismissal, the "complaint must contain sufficient factual matter accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (Citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "Labels and conclusions" or, "a formulaic recitation of the elements of a cause of action" that amount to "naked assertions" will not do. Id.

The Eleventh Circuit has explained "that courts considering motions to dismiss [should] adopt a 'two-pronged approach' in applying these principles [by] . . . eliminat[ing] any allegations in the complaint that are merely legal conclusions; and . . . where there are well-pleaded factual allegations, assume their veracity and then determine whether

cause exists, we deal with probabilities . . . [which] are the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act.

An arresting officer is required to conduct a reasonable investigation to establish probable cause. An officer, however need not take every conceivable step . . . at whatever costs, to eliminate the possibility of convicting an innocent person. Furthermore, once an officer makes an arrest based upon probable cause, he need not investigate independently every claim of innocence. Probable cause is judged not with clinical detachment but with a common sense view to the realities of normal life.

Rankin v. Evans, 193 F.3d, 1425, 1435 (11th Cir. 1998) (alterations in original) (quotations and citations omitted).

they plausibly give rise to an entitlement to relief." Am. Dental Ass'n v. Cigna Corp., 605 F.3d 1283, 1290 (11th Cir. 2010). Importantly, Plaintiff has the burden of demonstrating the absence of probable cause in order to succeed in his § 1983 claim. Evans v. Hightower, 117 F.3d 1318, 1320 (11th Cir. 1997) ("In order to establish a Fourth Amendment violation, [plaintiff] must demonstrate that a seizure occurred and that it was unreasonable.").

When viewed through these lenses Count I reduces to allegations that false testimony by affidavit regarding Plaintiff's access to the decedent, the time of death, forced entry, and what witnesses said about the timing and direction of a shot resulted in the absence of probable cause. Count II distills to allegations that Plaintiff was told by Defendant Rogers not to leave an interview and that his telephone was taken without probable cause or other lawful authority. Count III condenses to allegations that Defendant Rogers initiated Plaintiff's prosecution for murder without probable cause.⁴

Apart from the Complaint's "Factual Allegations Common To All Counts" section's (Doc. 12, ¶¶ 6-15) contribution to the shotgun nature of the complaint⁵ and it being

⁴ Additionally, Plaintiff fails to allege that he was ever arraigned, which is a prerequisite to a § 1983 claim for malicious prosecution. See Kingsland v. City of Miami, 382 F.3d 1220, 1235 (11th Cir. 2004).

⁵ A "shotgun complaint, contains several counts, each one incorporating by reference the allegations of its predecessors, leading to a situation where most of the counts . . . contain irrelevant factual allegations and legal conclusions. Consequently, in ruling on the sufficiency of a claim, the trial court must sift out the irrelevancies, a task that can be quite onerous." Strategic Income Fund, LLC v. Spear, Leeds & Kellogg Corp., 305 F.3d 1293, 1295 (11th Cir. 2002). While Plaintiff's counts do not incorporate by reference each of its predecessor's counts, the incorporation of immaterial allegations from its "Factual Allegations Common To All Counts" section into each count (see Doc. 12, ¶¶ 16, 29, 39, 61, 68 and 73) requires the Court to sift out irrelevancies in order to decide which facts are relevant to which cause of action.

predominated by conclusory and argumentative allegations,⁶ the Complaint fails to communicate plausible entitlement to relief. While the Court agrees with Plaintiff that the attachment of the search warrants and affidavits reportedly falsified by Defendant is not required to plead the causes of action asserted (Doc. 18, p. 6), facts or the absence of facts making the absence of probable cause plausible are required. Neither has been articulated in the Instant Complaint.

Plaintiff alleges that Rogers falsified the kinds of facts which, in the Court's experience, are important to findings of probable cause in homicide investigations: the time of death, access to and the location of the victim, and what witnesses said about shots fired and their direction. Without context, however, these facts are naked assertions which fail to assist an understanding of how probable cause is allegedly absent. The balance of facts scattered through the Complaint do nothing to remedy this deficiency. Consider for example Plaintiff's allegation that Defendant's affidavits (not a clue about their substance having been provided in the Complaint) "omit any references to known and persuasive exculpatory evidence, including (but not limited to) the ominous e-mails Michelle O'Connell sent to her sister the night of her death which are indicative of her state of mind." (Doc. 12, ¶ 19).

Putting aside the argumentative character of the allegation, there remains not a bit of assistance in determining what the victim's state of mind was, how the e-mail was exculpatory, what the other known exculpatory evidence was, or how any of those things

⁶ The absence of factual support for Plaintiff's references to a "predetermined theory" (Doc. 12, ¶ 10), "predetermined hypothesis" (Doc. 12, ¶ 11) "unsupported innuendo" (Doc. 12, ¶ 11a) "purposely skewing objectivity" (Doc. 12, ¶ 11b), "vital exculpatory information" (Doc. 12, ¶ 11c), "unduly influenced" (Doc. 12, ¶ 11d) and their resulting conclusory character also render the references argumentative.

relate or are important to probable cause or its absence. Plaintiffs' naked factual allegations, without a reference to the facts alleged to establish probable cause, can not in and of themselves establish the absence of probable cause. The Court is mindful that proof is not required at this juncture of the case. Nevertheless, Rule 8 requires a short plain statement sufficient to put Defendant on notice of facts or inferences from them which make the absence of probable cause plausible. The allegations of Plaintiffs' Amended Complaint simply fail to accomplish that requirement.

Because the remainder of Plaintiff's state law claims⁷ against Defendant Rogers each also depend on a clear articulation of the absence of probable cause to raise Defendant's "right to relief above the speculative level," Twombly, 550 U.S. at 555, the Court will not address them further at this juncture. Defendant's qualified immunity claim, given its even greater dependence on scrutiny of factual allegations surrounding probable cause,⁸ will likewise not be analyzed at this juncture. Both matters are more appropriately addressed following Plaintiff's attention to the requisite factual allegations to be included in a short and plain statement of claims against Defendant.

Accordingly, upon consideration, it is

ORDERED AND ADJUGED:

1. Defendant, Rusty Ray Rogers's Motion to Dismiss Plaintiff's Amended Complaint (Doc. 16) is **GRANTED** as set forth herein.
2. Plaintiff's Request for Oral Argument (Doc. 19) is **DENIED** as moot.

⁷ To state causes of action for common law malicious prosecution and intentional infliction of emotional distress, minimally, allegations supporting an absence of probable cause are required. See McCraney v. Barberi, 677 So. 2d 355, 356 (Fla. 1st DCA 1996); McCray v. Holt, 777 F. Supp. 945, 946 (S.D. Fla. 1991).

⁸ See Kingsland v. City of Miami, 382 F.3d 1220 (11th Cir. 2004).

3. Counts I, II, III, V and VI of Plaintiffs Amended Complaint are hereby **DISMISSED** without prejudice.

4. Plaintiff shall file an Amended Complaint on or before **March 5, 2015**.

5. The parties' Joint Motion for Pretrial Conference and Case Management (Doc. 43) is hereby **GRANTED**. A Pretrial and Case Management Conference pursuant to Fed.R.Civ.P. 16 is hereby scheduled for **FRIDAY, MARCH 20, 2015, at 9:00 A.M.** before the undersigned in Courtroom 12C, Twelfth Floor, United States Courthouse, 300 North Hogan Street, Jacksonville, FL.

6. Plaintiff's Motion to Reassign Case From Track Two Status to Track III Status (Doc. 48) is hereby **DENIED**.

DONE and ORDERED in Jacksonville, Florida this 13th day of February, 2015.



BRIAN J. DAVIS
United States District Judge

Copies to:

Counsel of Record