

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

DAVID SUMMERS,	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	CIVIL ACTION NO. H-05-4272
	§	
KENNETH REILLY, DWIGHT CANTRELL,	§	
DIANE DOTTAVIO, AND THE	§	
CITY OF MONTGOMERY,	§	
<i>Defendants.</i>	§	

**MEMORANDUM AND ORDER**

The City of Montgomery and Kenneth Reilly have each filed a second motion to dismiss (Dkts. 25, 26) David Summers’s complaint.<sup>1</sup> Having considered the parties’ submissions and applicable law, the court concludes that the City of Montgomery’s motion should be granted, Reilly’s motion should be granted conditionally, and plaintiff should be given an opportunity to amend as to defendant Reilly only.

**BACKGROUND**

At the time of events giving rise to this lawsuit, David Summers was the founder, majority shareholder, and a director of a publicly traded company called Endovasc, Inc.<sup>2</sup> On

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<sup>1</sup> The district court conditionally granted initial motions to dismiss by Reilly and City of Montgomery but granted Summers leave to amend (Dkts. 13, 16), which he has now done. Prior motions to dismiss defendants Cantrell and Dottavio were denied, and those defendants have not filed subsequent motions. The parties now have consented to the jurisdiction of this magistrate court for all purposes, including final judgment.

<sup>2</sup> In accordance with the standards governing a Rule 12(b)(6) motion, allegations in plaintiff’s  
(continued...)

December 16, 2003, Kenneth Reilly, a part-time municipal judge for the City of Montgomery, assisted by an off-duty police officer who also was Reilly's bailiff, forcibly removed Summers from the Endovasc premises. There was no lawsuit or other proceeding involving Summers or Endovasc pending in Montgomery Municipal Court at that time. The officer acted on directions from Reilly. Reilly used his position as a judge to effect Summers's removal in furtherance of his personal interests. Reilly was motivated by a desire to assist defendants Cantrell and Dottavio in gaining control of Endovasc in the hope of securing consulting business from them. The City of Montgomery acquiesced in Reilly's actions by permitting the use of an off-duty officer and by not taking action to prevent Reilly from using his title to further his personal interests, despite having knowledge that Reilly had done so in the past. Summers asserts that the above facts state a claim under 28 U.S.C. § 1983 for violation of his First and Fourteenth Amendment rights to be free from deprivation of his liberty interests without due process of law.

The City of Montgomery contends that Summers has failed to plead a policy or custom of the City of Montgomery that was the moving force behind his alleged constitutional deprivation, or that Reilly was a policymaker for the City of Montgomery. Reilly contends that Summers has failed to allege facts that state a constitutional violation by Reilly, and that Reilly is entitled to judicial immunity.

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<sup>2</sup> (...continued)  
amended complaint (Dkt. 24) are accepted as true only for purposes of this motion.

## ANALYSIS

### A. Rule 12(b)(6) Standards

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure is viewed with disfavor and is rarely granted. *Priester v. Lowndes County*, 354 F.3d 414, 418 (5th Cir. 2004) (citing *Lowrey v. Tex. A&M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997)). The complaint must be liberally construed in favor of the plaintiff and all well-pleaded facts must be taken as true. *Id.* A claim may only be dismissed if the plaintiff is not entitled to relief under any set of facts or any possible theory of recovery that he could prove consistent with the allegations in his complaint. *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999); *ABC Arbitrage Plaintiffs Group v. Tchuruk*, 291 F.3d 336, 348 (5th Cir. 2002).

In making this determination, the Court may not look beyond the pleadings, including any attachments thereto. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). The Court should “not strain to find inferences favorable to the plaintiff.” *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 361 (5th Cir. 2004) (quoting *Westfall v. Miller*, 77 F.3d 868, 870 (5th Cir. 1996)). The plaintiff’s complaint must contain allegations of every material point necessary to sustain recovery. *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995). Statements that merely create a suspicion that the plaintiff may have a right of action do not foreclose a motion to dismiss. *Id.* Furthermore, legal conclusions, conclusory allegations, and unwarranted deductions of fact do not suffice to prevent dismissal. *Jones v. Alcoa, Inc.*, 339 F.3d 359, 362, 364 (5th Cir. 2003).

## **B. Sufficiency of Summers's Allegations**

“Section 1983 provides a private right of action against parties acting ‘under color of any statute, ordinance, regulation, custom, or usage, of any State’ to redress the deprivation of rights secured by the United States Constitution or federal law.” *Bauer v. Texas*, 341 F.3d 352, 357 (5th Cir. 2003) (quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1988)). The court first addresses whether Summer has alleged a violation of any recognized constitutional right. In this case, Summers's amended complaint purports to allege a cause of action under § 1983 based on a deprivation of his First and Fourteenth Amendment due process rights.

Taking the allegations in the amended complaint in the light most favorable to Summers, the court finds no allegation that Summers engaged in any speech or activity protected by the First Amendment.<sup>3</sup> Nor can such an allegation be reasonably inferred from the facts that are alleged. Summers has failed as a matter of law to state a § 1983 claim premised on violations of his First Amendment rights, and that claim will be dismissed.

The court next must determine whether the amended complaint alleges an infringement of a recognized liberty interest protected by the due process clause of the

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<sup>3</sup> The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment.<sup>4</sup> The Supreme Court has held that “the interest denominated as a ‘liberty’ be [not only] ‘fundamental’ (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society.” *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (finding that biological father did not have a liberty interest in his relationship with his child when child was conceived by and born to a married woman living at the time with her husband).

Summers alleges that he was “forcibly removed” on one occasion from a private place of business. This vague assertion does not state the type of infringement on liberty associated with a constitutionally protected liberty interest. Summers does not allege that he was arrested, that the officer used excessive force, that he has been prevented from pursuing his chosen occupation, or that he has been stigmatized. *See, e.g., DeShaney v. Winnebago*, 489 U.S. 189, 200 (1989) (“In the substantive due process analysis, it is the State’s affirmative act of restraining the individual’s freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the ‘deprivation of liberty’ triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.”); *Stidham v. Texas Commission on Private Security*, 418 F.3d 486, 491-92 (5th Cir. 2005) (recognizing a constitutionally protected liberty interest in pursuing a chosen occupation); *Castellano v. Fragozo*, 352 F.3d

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<sup>4</sup> Summers does not specify whether his claim is for deprivation of substantive or procedural due process rights. The court assumes based on the facts alleged that Summers is asserting a substantive due process right.

939, 957-58 (5th Cir. 2003) (elements of state malicious prosecution tort not sufficient to state claim under § 1983; the due process of the Fourteenth Amendment protects fundamental fairness of criminal proceedings); *Hughes v. City of Garland*, 204 F.3d 223, 226 (5th Cir. 2000) (damage to reputation alone does not give rise to protected liberty interest; in employment context the stigma of discharge implicates a constitutionally protected liberty interest only if the manner of discharge stigmatizes the former employee in such a way as to foreclose him from future employment opportunities). Summers has cited, and the court has found, no case recognizing a constitutionally protected liberty interest under similar factual circumstances.

The court concludes that Summers's amended complaint does not state a claim for a violation of § 1983 based on the Fourteenth Amendment.

### **C. Summers's Claim Against The City of Montgomery**

There is an additional ground for dismissal of Summers's claims against the City of Montgomery. A municipality, such as the City of Montgomery, cannot be liable under § 1983 on a theory of *respondeat superior*. *Monell v. Dep't of Social Servs. of New York*, 436 U.S. 658, 691 (1978); *Doe on Behalf of Doe v. Dallas Independent School Dist.*, 153 F.3d 211, 215-16 (5th Cir. 1998). "Thus, § 1983 municipal liability may be imposed when (1) the enforcement of a municipal policy or custom was (2) 'the moving force' of the violation of federally protected rights." *Doe on Behalf of Doe*, 153 F.3d at 216. An unconstitutional policy can be inferred from a single action only if taken by an official with policymaking

authority. *City of St. Louis*, 485 U.S. at 123. The plaintiff cannot meet his burden by making conclusory allegations; the complaint must allege specific facts describing the custom or policy and its relationship to the underlying violation. *Spiller v. City of Texas City Police Dep't.*, 130 F.3d 162, 167 (5th Cir. 1997).

Summers states only in a conclusory fashion that “[t]he city engaged in a policy or custom both by not taking action to correct Reilly’s improper conduct, and by allowing him to ‘hire’ bailiffs for his personal business. Reilly possessed policy making authority to determine the proper use of his ‘judicial title’ and his bailiffs.”<sup>5</sup> Summers cites no authority in his response to the City’s motion to dismiss for his proposition that Reilly was the final policymaker with authority to determine the proper use of his judicial title and his bailiffs. As a matter of law, Reilly is not a final policymaker for the City of Montgomery. That distinction belongs to the city council. *See* TEX. LOC. GOV’T CODE ANN. § 22.031; *Bennett v. City of Slidell*, 728 F.2d 762, 767 (5th Cir. 1984) (en banc). Therefore, municipal liability can only be shown if there is an allegation of an official City policy or custom that motivated Reilly to forcibly remove Summers from his business on December 16, 2003. There is no such allegation in this case. Indeed, because Summers alleges that Reilly was acting without jurisdiction and for his own personal benefit, it is reasonable to infer from Summers’s allegations that Reilly was a rogue actor who was not acting on behalf of the City.

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<sup>5</sup> Amended complaint, ¶ 9.

Moreover, there is no allegation that the City was aware of Reilly's actions in this case, but only a conclusory allegation that the City acquiesced in Reilly's actions. Summers's allegation that the City failed to stop Reilly from improperly using his title is apparently premised on the assumption that the City was aware of a public reprimand issued against Reilly by the State Commission on Judicial Conduct in case CJC No. 04-0360-MU.<sup>6</sup> However, that case related to Reilly's use of the title "Judge" in promoting his public speaking business. There is no alleged relationship between the facts giving rise to the public reprimand and the facts of the present case. It is not reasonable to infer from that public reprimand that the City was aware of or deliberately indifferent to Reilly's conduct in this case. The motion to dismiss plaintiff's § 1983 claim against the City of Montgomery must be granted for this reason, in addition to Summers's failure to allege a constitutional violation.<sup>7</sup>

**D. Summers's Claim Against Kenneth Reilly**

Reilly argues that Summers's claims should be dismissed because he fails to allege Reilly acted under color of state law, and because Reilly is entitled to judicial and qualified immunity.

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<sup>6</sup> The Public Reprimand is attached to the amended complaint and is properly considered in determining this Rule 12(b)(6) motion. *U.S. ex rel Willard v. Humana Health Plan of Texas, Inc.*, 336 F.3d 375, 379 (5th Cir. 2003).

<sup>7</sup> This was the precise ground on which the City of Montgomery's first motion to dismiss was conditionally granted. Therefore, there is no reason to allow Summers yet another opportunity to amend his complaint against the City.

In order to state a claim under § 1983 against Reilly, plaintiff must allege that Reilly acted under color of state law in violating his constitutional rights. *Green v. State Bar of Texas*, 27 F.3d 1083, 1087 (5th Cir. 1994). The amended complaint alleges that plaintiff's injuries "were accomplished under state law" and that Reilly "utilized his position as judge and directed his bailiff to take action in the complete absence of all jurisdiction."<sup>8</sup> It is clear that an individual may act under color of state law even though his actions are outside the scope of his authority. In *United States v. Classic*, the court said; "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of state law." 313 U.S. 299, 326 (1941). The Supreme Court further explained the meaning of the phrase in *Screws v. United States*, 325 U.S. 91, 111 (1945):

It is clear that under 'color' of law means under 'pretense' of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it. If, as suggested, the statute was designed to embrace only action which the State in fact authorized, the words 'under color of any law' were hardly apt words to express the idea.

In this case, Summers alleges that Reilly acted beyond the scope of his authority. He also alleges that Reilly utilized his position as judge to remove Summers from the business

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<sup>8</sup> Amended complaint, ¶ 1.

premises, and used his courtroom bailiff in the process. The amended complaint sufficiently alleges that Reilly acted under color of state law.<sup>9</sup>

Moreover, the allegation that Reilly acted in the complete absence of jurisdiction is sufficient to defeat Reilly's motion to dismiss based on judicial immunity. Judicial immunity may be overcome in two circumstances: (1) the judge's actions are not taken in his judicial capacity and (2) the judge's actions, though judicial in nature, are taken in the complete absence of all jurisdiction. *Mireless v. Waco*, 502 U.S. 9, 11 (1991).<sup>10</sup>

When a defendant invokes qualified immunity, the burden is on the plaintiff to demonstrate the inapplicability of the defense. *Atteberry v. Nocona General Hosp.*, 430 F.3d 245, 253 (5th Cir. 2005). In the context of a motion to dismiss, a plaintiff must claim two things: (1) a constitutional violation; and (2) that the defendant's actions were objectively unreasonable in light of the law that was clearly established at the time of defendant's actions. *Id.* The court has already concluded that the amended complaint fails to allege a violation of Summers's Fourteenth Amendment due process right.

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<sup>9</sup> Summers submits the affidavit of Gary Goff in plaintiff's response to the City of Montgomery's second motion to dismiss (Dkt. 27-1, Ex. A), stating that Reilly gained entry into the Endovasc premises by representing that he was on "official business with the Montgomery police department to evict the President of Endovasc, Dr. David Summers, from the building." The court will not consider evidence outside the four corners of the complaint, including attachments thereto, in deciding the pending motion to dismiss. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000) (allowing an extremely narrow exception to the rule that limits consideration of evidence to the complaint and attachments to the complaint – the exception does not apply to the present case).

<sup>10</sup> Failure to allege that Reilly acted without jurisdiction was the basis for the district court's conditional order of dismissal granting Reilly's first motion to dismiss. *See* Dkt. 16.

However, Reilly did not raise a defense of qualified immunity in his first motion to dismiss. Therefore, Summers was not put on notice prior to filing his amended complaint that Reilly was asserting such a defense. The court concludes that the interests of justice require allowing Summers a final opportunity to amend his complaint as to Reilly only in order to allege, if he is able to do so in good faith, facts relating to the events of December 16, 2003 that give rise to a liberty interest protected by the Fourteenth Amendment.

### **CONCLUSION**

For the reasons discussed above, it is hereby

ORDERED that the City of Montgomery's second motion to dismiss (Dkt. 25) is granted. Summers's claims against the City of Montgomery are dismissed in their entirety with prejudice. Because Summers's claims against the City of Montgomery are dismissed, the City's pending motion to compel disclosures and interrogatory responses (Dkt. 31) is denied as moot. It is further

ORDERED that Kenneth Reilly's second motion to dismiss (Dkt. 26) is conditionally granted. Summers is granted leave to file on or before 20 days after entry of this Order a third amended complaint against Reilly alleging a violation of § 1983 based on the deprivation of his liberty interests protected by the Fourteenth Amendment without due process of law. Failure to do so will result in dismissal of Summers's case against Reilly.

Signed at Houston, Texas on August 29, 2006.

  

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Stephen Wm Smith  
United States Magistrate Judge