IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LIONETTA WHITE Plaintiff, v. CITY OF CHICAGO, et al Defendants.	)))))))))	Case No. 17-cv-2877 Judge Sara Ellis Magistrate Judge Laura McNally

DEFENDANT KALLATT MOHAMMED'S REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendant, Kallatt Mohammed ("Mohammed"), by and through one of his attorneys, Special Assistant Corporation Counsel Eric S. Palles of Mohan Groble Scolaro, P.C., in further support of his Motion for Summary Judgment states as follows:

INTRODUCTION

Mohammed and the other Defendant Officers have moved for summary judgment in their favor. In response, Plaintiff states that he has withdrawn his due process and pretrial detention/ federal malicious prosecution claims against Mohammed and several of the other Defendant Officers. Accordingly, Plaintiff tacitly admits that Mohammed and the others were not personally involved in arresting, detaining or prosecuting Plaintiff without probable cause or in fabricating evidence against him. Rather, Plaintiff devotes three pages of a 115-page legal memorandum to arguing that, notwithstanding the foregoing, he has viable claims against Mohammed for failure to intervene and for conspiracy. Although the parties have extensively argued about the admissibility of Lionel White's pretrial out-of-court statements, the admissibility of those

statements are not dispositive of the remaining claims against Mohammed because even with those statements the evidence could not sustain Plaintiff's claim.

WHITE'S STATEMENTS ARE INADMISSIBLE

Notwithstanding Plaintiff's argument to the contrary, once White's out-of-court statements are eliminated, Plaintiff is unable to create a genuine issue as to the material, and dispositive, fact: whether Watts and Jones fabricated the evidence that White was in possession of illegal drugs. Rasaan Brakes's testimony is that when he left White's company, he observed Watts, Jones, Smith and Mohammed enter the building and, thirty minutes later, the officers escorting White out of the building. Dkt. 240 ("JSOF") ¶¶ 77-78. Brakes also testified that White was sober at the time of his arrest. Id. ¶ 87. Precisely how this testimony serves to undercut the officers' version of the arrest is obscure. The testimony does nothing to contradict the other testimony that, after Jones entered the building, he confronted White, that after White had exited his apartment he began to flee, that White was detained and ultimately found to be in possession of illegal narcotics. Certainly, enough time had elapsed between the time Brakes left White and observed him in custody for the events to have transpired in the manner reflected in the police reports. JSOF ¶¶ 31-46. Additionally, Brakes's comment that White was sober at the time he saw him is a red herring: nobody has claimed that White used the drugs, merely that he possessed them. Similarly, the testimony of Kimberly Collins, that she left her apartment clean in the morning and returned to find the apartment in disarray has no probative value on the question whether White possessed illegal narcotics. JSOF ¶ 92. There is no basis to corroborate White's allegations of fabrication and there is no admissible evidence that can overcome this motion for summary judgment.

Fed. R. Evid. 807

White's out-of-court statements and his affidavit are not admissible under the residual hearsay exception of Fed. R. Evid. 807. First, Plaintiff did not provide the requisite notice of intent. Plaintiff's counsel did not disclose that the statements would be used until negotiations concerning the joint statement of facts required by this Court. The argument that notice is not required until the eve of trial is simply wrong. The Rule explicitly requires that "notice must be provided in writing before the trial *or hearing*" (emphasis added) and, in the absence of this notice, the residual exception has been rejected at the summary judgment stage. *Herrick v. Garvey*, 298 F.3d 1184, 1192-93 (10th Cir. 2002).

Plaintiff further suggests, without citation, that the exacting scrutiny that the federal courts have used to enforce this requirement no longer inheres in the absence of prejudice to the non-proponent. Mohammed has withdrawn his claim of prejudice; it is simply not a consideration under Rule 807 nor has it ever been. *Lloyd v. Professional Realty Services, Inc*., 734 F.2d 1428, (11th Cir. 1984), cert. denied, 469 U.S. 1159 (1985).

More fundamentally, however, White's statements and his affidavit lack sufficient guarantees of trustworthiness. The Seventh Circuit has directed the courts to narrowly construe the residual exception to the hearsay rule, stating that it should be used very rarely, and only in exceptional circumstances. *Keri v. Board of Trustees of Purdue Univ*., 458 F.3d 620, 631 (7th Cir. 2006); *United States v. York*, 852 F.2d 221, 224 n.1 (7th Cir. 1988); *Hill v. City of Chicago*, No. 06 C 6772, 2011 U.S. Dist. LEXIS 98494, *14, 2011 WL 3876915 (N.D. Ill., Sept.1, 2011). Rather than distinguish the cases that Mohammed has cited in his original memorandum in any meaningful way, Plaintiff attempts to cherry-pick certain supposed, albeit insignificant, differences. Thus, in support of the admissibility of the White affidavit, Plaintiff focuses on the

fact that the affidavit in *Brown v. City of Chicago*, 633 F. Supp 3d 1122 (N.D. Ill. 2022) was a recantation rather than that Judge Pallmeyer's central concerns with the affidavit were its lack of corroboration and the absence of evidence surrounding the circumstances of its creation, *e.g.*, who drafted it, or who was present when it was signed, etc. *Id.* at 1160.[1]

Conversely, Plaintiff places too much stock upon *Harris v. City of Chicago*, 327 F.R.D. 199 (N.D. Ill. 2018). A bedrock principle of Rule 807 is that where a statement was prepared in anticipation of litigation, and the adverse parties lacked the ability to cross-examine the declarant, guarantees of trustworthiness' are lacking and Rule 807 does not apply. *See, e.g., Ponzini v. Monroe County*, No. 3:11-CV-00413, 2016 U.S. Dist. LEXIS 114855, 2016 WL 4500775, at *1 n.1 (M.D. Pa. Aug. 26, 2016); *New Mexico ex rel. Balderas v. Real Estate Law Center, P.C.*, 406 F. Supp. 3d 1049, 1080 (D.N.M. 2019). In *Harris*, Judge Feinerman allowed a decedent's electronically recorded IPRA statement which was subject to lengthy clarifying questions, albeit by an IPRA investigator, and under the assumption that the declarant's knowledge of this imminent death negated any mercenary motive. *Harris, supra*, at 202. By contrast, when White spoke with COPA there is no suggestion that he knew he would die before this matter came to trial, no evidence that he was extensively questioned because his lawyers refused to allow recording, the statement was not verbatim and it was given during the pendency of this litigation. Similarly, White's affidavit was apparently prepared in anticipation of litigation; whether it was prepared in anticipation of *this* litigation is beside the point for purposes of analysis of the Rule.

[1] Similarly, Plaintiff discounts the persuasiveness of *Crittenden v. Children's Hospital*, 2004 U.S. Dist. LEXIS 12944 ; 2004 WL 1529242 (W.D.N.Y. June 30, 2004), where the district court declined to consider decedent's affidavit in connection with a summary judgment motion by erroneously stating that Rule 807 was not discussed when the court explicitly stated that this patently inadmissible affidavit did not fall into the hearsay exception in Rule 807. 2004 U.S. Dist. LEXIS 12944 *5.

With or without the benefit of this inadmissible hearsay, Plaintiff cannot surmount the motion for summary judgment. Mohammed and the Defendant Officers are entitled to judgment in their favor.

Fed. R. Evid 803

Plaintiff has argued alternatively that White's statements are admissible under Fed. R. Evid. 803(8), which excepts "factual findings from a legally authorized investigation." The rule is not, however, "a multilevel exception covering all hearsay contained in a public record." *Hernandez v. Colegio Y Noviciado Santa Maria Del Camino, Inc*., 104 F. Supp. 3d 203, 206 (D.P.R. 2015) *Emhart Indus., Inc. v. New Eng. Container Co.*, 2024 U.S. Dist. LEXIS 181162, *74. Hearsay statements are not exempted from the hearsay bar simply because they were related to a government officer or investigator. *Stolarczyk v. Senator Int'l Freight Forwarding*, 376 F. Supp. 2d 834, 839 (N.D. Ill. 2005) Mere transcripts of third-party statements do not constitute factual findings and still count as hearsay. *Jordan v. Binns*, 712 F.3d 1123, 1133-34 (7th Cir. 2013); *Daniel v. Cook County,* 833 F.3d 728, 739-740 (7th Cir. 2016), and the interview notes prepared by OPS in 2006 and by COPA in 2018 are not public investigatory reports, nor do they contain "factual findings." *Stolarczyk, supra* at 240.

As to the actual reports created by OPS and by COPA, they are hardly any help to Plaintiff. Whether, as Plaintiff argues, the findings are admissible as an admission by a party-opponent against the City on a *Monell* claim is beyond the scope of this Motion. Notably, neither report made any findings related to Mohammed, OPS did not sustain findings against Watts or Jones and COPA did not sustain findings against Bolton, Leano, Nichols or Gonzalez related to the Lionel White arrest. Mohammed is therefore entitled to judgment as a matter of law.

CONSIDERATION OF THE INADMISSIBLE EVIDENCE STILL ENTITLES MOHAMMED TO SUMMARY JUDGMENT

As we noted, White's statements are inadmissible. Although the inadmissible statements and affidavits are clearly inappropriate for consideration on this motion for summary judgment, it is notable that even were they considered for the truth of the matters asserted, they do not provide sufficient evidence to support a claim against Mohammed. In his various iterations, White describes a confrontation that took place in a fifth-floor apartment between him, Watts and Jones. There were no other witnesses. *See* JSOF ¶¶ 115, 118, 120. White alleges that, after being warned that police were arriving, he retreated to his girlfriend's apartment. *Id.* Shortly after, Watts and Jones entered the apartment and Jones punched White. *Id.* The officers searched the apartment and although they did not recover any drugs, they arrested White for drug possession, to which he pleaded guilty two months later. *Id*. White stated he first saw Mohammed in the building lobby after he was taken downstairs. JSOF ¶ 120. Twelve years earlier, he identified Mohammed's photograph but told the OPS investigator that Mohammed had nothing to do with his arrest. JSOF ¶ 116. Thus, even if White's statements were admissible, they tend to exonerate Mohammed from any liability. Plaintiff has admitted as much by abandoning his claims of fabrication and wrongful detention against Mohammed based on his lack of personal involvement.

The Failure to Intervene Claim Must Fail

So too the failure-to-intervene claim must fail. While an officer who is present and fails to intervene to prevent other law enforcement officers from infringing upon the constitutional rights of citizens is liable under § 1983 if he has reason to know that a constitutional violation has

been committed and a realistic opportunity to intervene, *Lanigan v. Vill. of E. Hazel Crest*, 110 F.3d 467, 477-78 (7th Cir. 1997). Crediting White's statement, the evidence is uncontroverted that only Watts and Jones were present when he was arrested and that White did not see Mohammed until he was escorted to the lobby. *See Gill v. City of Milwaukee*, 850 F.3d 335, 342 (7th Cir. 2017) (plaintiff must prove that the defendant officers knew that a constitutional violation was committed and had a realistic opportunity to prevent it); *Culp v. Reed*, No. 19-cv-106, 2021 U.S. Dist. LEXIS 172009, at *14-15, 2021 WL 4133703, at *5 (N.D. Ind. Sep. 9, 2021), *citing Byrd v. Clark,* 783 F.2d 1002, 1007 (11th Cir. 1986) (duty to intervene only arises if a constitutional violation occurs in another officer's presence). Not only did White assert that only he, Watts and Jones were present for his arrest, he went to pains in his OPS statement to express that Mohammed was not involved. JSOF ¶ 116. Further corroboration is provided by the fact that Mohammed was contemporaneously involved in a "reverse sting" taking place on the first floor of the building. JSOF ¶ 132.

There is No Evidence that Mohammed Conspired to Frame Plaintiff

Regardless of the admissibility of White's statements, they do not further his conspiracy claim because he did not speak to that issue. The essence of a conspiracy is a meeting of the minds of the co-conspirators. *Amundsen v. Chicago Park District*, 218 F.3d 712, 718 (7th Cir. 2000). Characterizing a combination of acts as a conspiracy does not make it so. *Buckner v. Atlantic Plant Maintenance, Inc*., 182 Ill. 2d 12, 23-24 (1998). Although the summary judgment stage is the time for Plaintiff to show his cards, the "what, when, why, and how" of the Defendants' supposed agreement to deprive Plaintiff of his rights remains conspicuously lacking. *Amundsen, supra*. The "evidence" of conspiracy comes down to the claim that over 200 plaintiffs in this district have made similar claims, resulting in a "pattern of harassment." Dkt 270 at p.28. This is unadorned propensity evidence violative of Fed. R. Civ. P. 404(b) rather than evidence of a conspiracy.

Plaintiff's reliance upon *Geinosky v. City of Chicago*, 675 F.3d 743 (7th Cir. 2012), is woefully misplaced.

Geinosky involved a class-of-one equal protection claim that police officers engaged in a pattern of harassment directed against the plaintiff by issuing 24 traffic tickets against him within a period of 14 months. This "scenario" led the court inevitably to the conclusion that the officers had conspired against the plaintiff. Not so in this case where numerous individuals complain of their own wrongful arrests involving different circumstances in different locations over the span of a decade. Plaintiff has not produced any evidence that Mohammed entered into a scheme with the arresting officers to "frame" White, the only actionable conspiracy for the Court's consideration. There is no evidence that Mohammed was a party to any discussions concerning either White's arrest or his subsequent prosecution and the simple fact that he and the other members of the tactical team are listed as assisting officers in police reports that Plaintiff contends were false is unavailing. Indisputably, Mohammed did not author the reports (JSOF ¶¶ 42, 46) and there is no evidence that he ever saw them. In any event, it is not unlikely that officers could not provide the same account absent a conspiracy; it is equally plausible that they, and not White, are telling the truth. *McNeal v. Bruno*, No. 09 C 1500, 2012 U.S. Dist. LEXIS 56769, *40, 2012 WL 1414865 (N. D. Ill., Apr.24, 2012).

Similarly, that Mohammed operated in tandem with his tactical team to effectuate other arrests does not lead to the inference that he was engaged in an illegal conspiracy. "Consciously parallel behavior" is not, by itself, clear and convincing evidence of a conspiracy because the parallel behavior is susceptible to a non-conspiratorial explanation that is at least as reasonable as a conspiratorial explanation. *Gillenwater v. Honeywell Int'l, Inc*., 2013 IL App (4th) 120929, ¶ 82; *JerLib Invs., LLC v. Cohn & Cohn,* No. 19-cv-06203, 2023 U.S. Dist. LEXIS 57068 *37-38, 2023

WL 2745119 (N.D. Ill. Mar. 31, 2023). The evidentiary record in this case does not suggest a "whiff" of conspiracy. *Redd v. Nolan,* 663 F.3d 287, 292 (7th Cir, 2011).

WHEREFORE, Kallatt Mohammed prays that this Court enter summary judgment in his favor and against Plaintiff Lionetta White.

Respectfully submitted,

/s/ Eric S. Palles #2136473
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CERTIFICATE OF SERVICE

I, Eric S. Palles, an attorney, hereby certify that on May 21, 2025, I caused a true copy of the foregoing document to be served upon all counsel of record through the Court's ECF system.

/s/Eric S. Palles
Eric S. Palles